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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM ALSUP, JUDGE,

ORACLE AMERICA, INC.,)
)
PLAINTIFF,)
)
VS.) NO. C 10-3561 WHA
)
GOGGLE INC.,)
DEFENDANT.) THURSDAY
) SEPTEMBER 15, 2011
) 8:10 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: **MORRISON & FOERSTER LLP**
755 PAGE MILL ROAD
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BY: ROBERT A. VAN NEST, ESQUIRE**MICHAEL S. KWUN, ESQUIRE**

1 SEPTEMBER 15, 2011

8:10 O'CLOCK A.M.

2
3 P R O C E E D I N G S

4 THE COURT: ALL RIGHT. TIME IS SHORT TODAY, SO NO
5 ONE, EVEN THOUGH YOU'VE GOT MANY LAWYERS HERE, NO ONE IS
6 ENTITLED TO A HEARING. YOUR HEARING IS BY THE WRITTEN PAPERWORK,
7 BUT I WILL GIVE THE REST OF YOU A SHORT OPPORTUNITY TO MAKE SOME
8 POINTS.

9 WE WILL HEAR THE ORACLE CASE NEXT AND HEAR FIRST FROM
10 THE YOUNG PERSON WHO IS SUPPOSED TO ARGUE. AND THEN, THE TIME
11 WILL BE QUITE LIMITED AFTER THAT.

12 THE CLERK: 10-3561, ORACLE AMERICA VERSUS GOOGLE
13 INC.

14 MR. JACOBS: GOOD MORNING, YOUR HONOR. MICHAEL
15 JACOBS, MORRISON & FOERSTER FOR PLAINTIFF ORACLE AMERICA. WITH
16 ME IS ROMAN SWOOPES, THE YOUNG PERSON WHO WILL ARGUE, AND KEN
17 KUWAYTI, BOTH OF THEM FROM MORRISON & FOERSTER, AND MATTHEW
18 SARBORARIA FROM ORACLE.

19 THE COURT: GREAT. WELCOME TO ALL OF YOU.

20 AND?

21 MR. BABER: GOOD MORNING, YOUR HONOR. BRUCE BABER
22 FROM KING & SPALDING FOR GOGGLE. AND WITH ME IS BOB VAN NEST
23 FROM KEKER & VAN NEST, RENNY HWANG FROM GOOGLE, AND MICHAEL KWUN
24 FROM KEKER & VAN NEST.

25 THE COURT: ALL RIGHT. THIS IS YOUR MOTION FOR

1 SUMMARY JUDGMENT, SO LET'S HEAR FROM YOU FIRST.

2 PLEASE BE BRIEF BECAUSE I UNDERSTAND WHAT'S IN THE
3 PAPERS, AND I JUST WANT YOU TO MAKE YOUR MOST IMPORTANT POINTS.

4 **MR. BABER:** ALL RIGHT, YOUR HONOR. I BELIEVE THE
5 MOST IMPORTANT POINTS IN THE FRAMEWORK OF A COPYRIGHT CLAIM IS
6 IF WE RETURN TO CORE COPYRIGHT PRINCIPLES -- AND THERE'S REALLY
7 FOUR OF THEM I THINK THAT APPLY -- BUT IF YOU RETURN TO CORE
8 COPYRIGHT PRINCIPLES THAT APPLY REGARDLESS OF THE TYPE OF WORK,
9 SOFTWARE, ARTISTIC WORKS, LITERARY WORKS, THOSE DRIVE THE
10 DECISION IN LIGHT OF ESPECIALLY THREE DIFFERENT NINTH CIRCUIT
11 CASES THAT HAVE LOOKED AT SOFTWARE AND APPLIED THOSE SAME
12 PRINCIPLES.

13 THE FOUR PRINCIPLES ARE, NUMBER ONE: THE FUNDAMENTAL
14 IDEA EXPRESSION DICHOTOMY OF COPYRIGHT.

15 **THE COURT:** SAY THAT AGAIN.

16 **MR. BABER:** THE IDEA VERSUS EXPRESSION DICHOTOMY THAT
17 IS THE FUNDAMENTAL PREMISE OF THE COPYRIGHT LAWS. COPYRIGHT CAN
18 NEVER EVER PROTECT SOMETHING INTANGIBLE: AN IDEA, A CONCEPT, A
19 METHOD, A PRINCIPLE, A SYSTEM THAT IS EXPLICIT IN THE STATUTE
20 102B. COPYRIGHT NEVER PROTECTS IDEAS.

21 THE SECOND POINT IS COPYRIGHT ONLY PROTECTS
22 EXPRESSION, AND IT ONLY PROTECTS EXPRESSION THAT IS FIXED IN A
23 TANGIBLE MEDIUM OF SOME KIND. SO YOU HAVE TO HAVE SOMETHING YOU
24 CAN HOLD IN YOUR HAND AND SAY:

25 "THIS IS THE EXPRESSION. THIS IS THE

1 PLAINIFF'S WORK. THIS IS THE DEFENDANT'S WORK. ARE
2 THEY IN THEIR ENTIRETIES SUBSTANTIALLY SIMILAR, OR IN
3 THE CASE OF SOFTWARE, VIRTUALLY IDENTICAL TO EACH
4 OTHER?"

5 SO YOU HAVE THE IDEA EXPRESSION DICHOTOMY, FIXATION
6 AND INTANGIBLE MEDIUM.

7 THE THIRD IS, YOUR HONOR -- IT'S JUST, AGAIN, A BASIC
8 PRINCIPLE OF COPYRIGHT LAW -- THAT NAMES, WORDS AND SHORT
9 PHRASES ARE NOT COPYRIGHTABLE. THERE'S A COPYRIGHT OFFICE
10 REGULATION THAT IDENTIFIES THOSE AS UNCOPYRIGHTABLE THINGS.
11 THEY ARE IN THE SAME CATEGORY AS FACTS. NO ONE CAN CLAIM
12 COPYRIGHT PROTECTION TO FACTS. NO ONE CAN CLAIM COPYRIGHT
13 PROTECTION TO NAMES AND SHORT PHRASES.

14 AND THEN, THE FOURTH, YOUR HONOR, IS A GROUP OF
15 RELATED DOCTRINES THAT ALSO TELL US CERTAIN THINGS ARE NOT
16 PROTECTABLE BY COPYRIGHT. THEY INCLUDE IN THE NINTH CIRCUIT FOR
17 SURE FUNCTIONAL, TECHNICAL REQUIREMENTS FOR COMPATIBILITY.

18 THE NINTH CIRCUIT HAS SAID AT LEAST TWICE -- MAYBE
19 THREE TIMES -- THAT IN THE COMPUTER SOFTWARE CONTEXT IF
20 SOMETHING IS AN FUNCTIONAL REQUIREMENT FOR COMPATIBILITY IT IS
21 NOT PROTECTABLE BY COPYRIGHT, AND BOTH THAT FUNCTIONAL
22 REQUIREMENT AND EXPRESSIVE ELEMENTS INCIDENT TO USE OF IT MAY BE
23 USED BY OTHERS.

24 THERE IS NO COPYRIGHT PROTECTION IN THE NINTH CIRCUIT
25 FOR THOSE KINDS OF ELEMENTS OF IDEAS OR FUNCTIONAL REQUIREMENTS.

1 ON TOP OF THAT THERE'S A NUMBER OF OTHER TRADITIONAL COPYRIGHT
2 DOCTRINES, THINGS WHERE IDEAS AND EXPRESSION MERGE. THERE'S A
3 VERY LIMITED NUMBER OF WAYS TO EXPRESS SOMETHING. THAT'S NOT
4 COPYRIGHTABLE.

5 **THE COURT:** SO IN THIS CASE ON THAT LAST POINT, GIVE
6 ME AN EXAMPLE OF SOMETHING THAT YOU SAY IS FUNCTIONAL AND
7 THEREFORE NOT COPYRIGHTABLE.

8 **MR. BABER:** ABSOLUTELY. YOUR HONOR, THERE'S SEVERAL
9 LEVELS. FIRST THERE IS THE MAJORITY OF THIS CLAIM, THIS
10 COPYRIGHT CLAIM, RELATES TO THESE INTANGIBLE THINGS CALLED
11 "API'S." THEY ARE INTERFACES. YOU CAN'T HOLD THEM IN YOUR
12 HAND. YOU CAN LOOK AT CERTAIN THINGS THAT DESCRIBE THEM OR TALK
13 ABOUT THEM, BUT THE INTERFACES THEMSELVES ARE ABSTRACTIONS.
14 THEY ARE CONCEPTS. THEY CAN'T BE PROTECTED IN AND OF THEMSELVES
15 BY COPYRIGHT.

16 DROPPING DOWN TO THE NEXT LEVEL -- AND I KNOW IN THE
17 COPYRIGHT FIELD WHEN YOUR HONOR'S HAD COPYRIGHT CASES AND YOU GO
18 TO DIFFERENT LEVELS OF ABSTRACTIONS -- BUT AT THE LEVEL OF
19 THINGS LIKE WHAT WE CALL IN THE DOCUMENTS "THE METHOD
20 SIGNATURES," THE PARAMETERS, THE TECHNICAL RULES AND
21 REQUIREMENTS FOR INVOKING THESE API'S ARE NOT PROTECTABLE.

22 THEY ARE THE FUNCTIONAL REQUIREMENTS OF IMPLEMENTING
23 THE API'S. WHAT WE HAVE HERE IS A SITUATION WHERE SUN AND ORACLE
24 HAVE PUT OUT THERE FOR YEARS THESE API'S.

25 WHAT THEY ARE WHEN YOU LOOK AT THEM IN SOME TANGIBLE

1 FORM WHAT THEY REALLY ARE ARE THE LIBRARIES. THERE ISN'T A PART
2 OF THE CODE THAT YOU POINT TO SEPARATE FROM THE LIBRARY AND YOU
3 SAY:

4 "THAT'S THE API OVER THERE, AND THE LIBRARY IS
5 OVER HERE."

6 WHAT'S IN THE LIBRARY IS THE ESSENTIAL ELEMENTS OF
7 THE IMPLEMENTATION OF THIS INTERFACE, THIS ABSTRACTION. AND IN
8 ORDER FOR JAVA PROGRAMMERS TO BE ABLE TO USE IN THE ANDROID
9 PLATFORM THE JAVA LANGUAGE -- AND YOU'VE HEARD MR. JACOBS AT
10 LEAST TWICE IN PRIOR HEARINGS STAND UP AND TELL YOUR HONOR, AND
11 YOU RECOGNIZED IT IN YOUR DAUBERT ORDERS:

12 "THERE IS NO CLAIM IN THIS CASE TO THE
13 LANGUAGE."

14 THESE API'S ARE ALL IN ANDROID IN ORDER TO FACILITATE
15 USE OF THE JAVA PROGRAMMING LANGUAGE BY PROGRAMMERS.
16 PROGRAMMERS THAT ARE FAMILIAR WITH THESE API'S, WHO HAVE
17 EXISTING CODE THAT UTILIZES THESE API'S, AND THEY MAY WANT TO
18 REUSE IN ANDROID PROGRAMS AND IN WRITING NEW CODE FOR ANDROID IN
19 THE JAVA LANGUAGE, TO BE ABLE TO USE THE SAME ABBREVIATIONS, THE
20 SAME VOCABULARY, IF YOU WILL, OF THE LANGUAGE, THE SAME PARTS OF
21 SPEECH THAT THEY HAVE COME TO KNOW AND BECOME FAMILIAR WITH IN
22 WRITING CODE.

23 THAT'S WHAT THE API'S PART OF THIS CASE IS ABOUT. AND
24 UNDER THE SEGA VERSUS ACCOLADE CASE, THE APPLE VERSUS MICROSOFT
25 CASE AND THE SONY VERSUS CONNECTIX CASE THE NINTH CIRCUIT HAS

1 SAID SEVERAL TIMES YOU CAN GO OUT AND COPY THE SOURCE CODE AND
2 THE OBJECT CODE OF SOMEONE'S PROPRIETARY SYSTEMS. YOU CAN COPY
3 IT MULTIPLE TIMES IN ORDER TO FIND OUT WHAT THESE FUNCTIONAL
4 REQUIREMENTS ARE, AND THEN YOU CAN CERTAINLY USE THEM.

5 THOSE WERE CASES, YOUR HONOR, IN SEGA, A THIRD PARTY
6 WANTED TO MAKE GAMES THAT WOULD PLAY ON THE SEGA PLATFORM. SEGA
7 DIDN'T WANT THAT, OF COURSE. THEY WANTED LICENSING REVENUE FROM,
8 YOU KNOW, PEOPLE DOING PROGRAMS THAT THEY WERE APPROVING OF.

9 COURT SAID:

10 "NO. THEY HAVE A RIGHT TO DO THAT."

11 THEY HAVE A RIGHT TO, IN EFFECT, COMMIT COPYRIGHT
12 INFRINGEMENT TO FIND OUT WHAT THE TECHNICAL REQUIREMENTS WERE.
13 AND THEN, ONCE THEY FOUND THEM OUT THEY CERTAINLY WERE FREE TO
14 USE THEM.

15 IN SONY VERSUS CONNECTIX YOU HAD A PARTY THAT WANTED
16 TO GO, IN EFFECT, BREAK THE CODE ON THE SONY PLAYSTATION. THE
17 NINTH CIRCUIT SAID IT'S OKAY TO MAKE MULTIPLE INTERMEDIA COPIES
18 IN ORDER TO DETERMINE WHAT WERE THESE TECHNICAL FUNCTIONAL
19 REQUIREMENTS SO THAT YOU COULD TAKE THOSE GAMES AND HAVE THEM
20 PLAY ON A DIFFERENT PLATFORM, ON PERSONAL COMPUTERS, COMPETITIVE
21 WITH SONY'S PLATFORM.

22 SO THE NINTH CIRCUIT HAS SQUARELY COME OUT ON THE
23 SIDE OF NOT ONLY CAN YOU DO, FRANKLY, WHAT SOME PEOPLE MIGHT
24 HAVE THOUGHT WERE SOME RADICAL THINGS TO FIGURE OUT WHAT THESE
25 FUNCTIONAL TECHNICAL REQUIREMENTS ARE, BUT YOU CERTAINLY ARE

1 FREE TO USE THEM WHEN THEY ARE OUT THERE AND YOU KNOW WHAT THEY
2 ARE.

3 SO THAT AT ITS CORE, YOUR HONOR, IS WHAT THIS
4 COPYRIGHT CLAIM IS ABOUT. I HAVE OBVIOUSLY LOTS OF OTHER
5 COMMENTS AND NOTES PREPARED, BUT IN TERMS OF THE COPYRIGHT
6 ISSUES --

7 **THE COURT:** WELL, HOLD THOSE POINTS, AND LET ME HEAR
8 FROM THE OTHER SIDE, AND THEN I'LL GIVE YOU A CHANCE TO RESPOND.

9 OKAY. SO JUST -- ALL RIGHT.

10 **MR. BABER:** FINE, YOUR HONOR.

11 **MR. JACOBS:** YOUR HONOR, OUR PLAN WAS TO SEQUENCE OUR
12 BRIEF COMMENTS WITH YOURS TRULY GOING FIRST, AND THEN MR.
13 SWOOPES. WOULD THAT BE ACCEPTABLE?

14 **THE COURT:** SURE. GO AHEAD.

15 **MR. JACOBS:** THE HEART OF THE DISPUTE, YOUR HONOR, IS
16 THE APPLICATION OF LABELS TO PROGRAMMING CONCEPTS. AND THE
17 PARTIES' EXPERTS ARE IN WILD DIVERGENCE ON HOW TO CHARACTERIZE
18 THESE APPLICATION PROGRAMMING INTERFACES.

19 WE'VE ASSEMBLED IN THIS SLIDE -- MAY I GIVE ONE TO
20 YOUR?

21 WE'VE ASSEMBLED IN THIS SLIDE --

22 **MR. BABER:** CAN WE HAVE A SET, COUNSEL? THANKS.

23 **MR. JACOBS:** WE HAVE ASSEMBLED IN THIS FIRST COUPLE
24 OF SLIDES, YOUR HONOR, SOME OF THE EXTRACTS FROM THE RECORD ON
25 THIS MOTION FOR SUMMARY JUDGMENT THAT INDICATES HOW COMPLEX AND

1 CREATIVE AND EVEN ESTHETIC AND ARTISTIC THE PROCESS OF API
2 CREATION IS.

3 THE KEY DISTINCTION BETWEEN THE API'S AT ISSUE IN
4 THIS CASE AND THE INTERFACES THAT ARE AT ISSUE IN THE CASES THAT
5 GOOGLE WOULD CITE IS THIS VERY POINT. WE'RE TALKING ABOUT AN
6 ELABORATE HIERARCHY AND STRUCTURE, A SET OF INTERRELATIONSHIPS.
7 AS MR. SWOOPES COUNTED IN HIS DECLARATION 11,000 PAGES THAT WERE
8 TAKEN BY GOOGLE FOR ITS OWN COMMERCIAL INTEREST TO CREATE NOT A
9 COMPATIBLE VERSION OF JAVA, BUT AN INCOMPATIBLE VERSION.

10 AND NONE OF THE DECISIONS ON WHICH GOOGLE RELIES DEAL
11 WITH THIS FACT SET. NONE OF THEM DEAL, FOR THAT MATTER, WITH A
12 HOTLY DISPUTED SET OF FACTS BETWEEN THE EXPERTS ABOUT HOW TO
13 PROPERLY CHARACTERIZE THESE APPLICATION PROGRAMMING INTERFACES.

14 BUT AMONG THE ADMISSION --

15 **THE COURT:** WHAT DO YOU SAY TO THE PLAYSTATION CASE
16 THAT I JUST HEARD ABOUT?

17 **MR. JACOBS:** THE PLAYSTATION CASE. FIRST OF ALL,
18 IT'S A CASE OF INTERMEDIA COPYING, AND THERE WAS NO ALLEGATION
19 BY SONY THAT THE FINAL VERSION WAS INFRINGING. THEY DID NOT
20 MAKE THAT CASE. THEY DID NOT MAKE THAT CLAIM.

21 SO THE SOLE QUESTION WAS WHETHER INTERMEDIA COPYING
22 ON THE WAY TO CREATING A NONINFRINGING CODE WAS FAIR USE OR NOT.
23 IT WAS NOT A QUESTION OF WHETHER AN ELABORATE APPLICATION
24 PROGRAMMING INTERFACE WAS PROTECTABLE BY COPYRIGHT.

25 THE CLOSEST DECISION IS THE ONE THAT GOOGLE RELIES ON

1 SO HEAVILY IS LOTUS V. BORLAND. AND IT'S QUITE STRIKING BECAUSE
2 IT SEEMS LIKE YESTERDAY, BUT IT'S BEEN 15 YEARS, YOUR HONOR,
3 SINCE THE SUPREME COURT ITSELF COULDN'T LAND ON THE QUESTION OF
4 WHETHER EVEN THAT RELATIVELY SIMPLE COMMAND STRUCTURE WAS AN
5 UNPROTECTABLE METHOD OF OPERATION OR A PROTECTABLE EXPRESSION.

6 BUT IN THAT 15 YEARS LOTUS V. BORLAND HASN'T SWEEPED
7 THE JUDICIAL LANDSCAPE. COURTS OF APPEALS HAVEN'T ADOPTED IT.
8 DISTRICT COURTS HAVEN'T ADOPTED IT. THERE HAS BEEN NO DECISION
9 IN THE NINTH CIRCUIT, IN PARTICULAR, THAT ADOPTS THE KEY LOGIC
10 MOVE THAT THE FIRST CIRCUIT MADE IN LOTUS V. BORLAND, AND THAT
11 MOVE WAS TO SAY:

12 "WE RECOGNIZE THAT IN THIS COMMAND STRUCTURE
13 THERE IS EXPRESSION. BUT THE METHOD OF OPERATION
14 EXCEPTION IN 102B TRUMPS THAT RECOGNITION."

15 NO COURT IN THE NINTH CIRCUIT, AND ACROSS THE LAND
16 GENERALLY, COURTS HAVE REJECTED THAT MOVE. SO ABSENT LOTUS V.
17 BORLAND, WE'RE LEFT IN A WORLD WHERE WE HAVE DECISIONS LIKE
18 JOHNSON CONTROLS IN THE NINTH CIRCUIT, WHICH CONTRARY TO
19 GOOGLE'S ARGUMENT IN ITS BRIEF NOTHING HAPPENED TO JOHNSON
20 CONTROLS ON ACCOUNT OF FEIST. FEIST IS A CASE ABOUT ORIGINALITY.

21 JOHNSON CONTROLS AND SAYS SWEAT OF BROW DOESN'T COUNT
22 FOR ORIGINALITY. JOHNSON CONTROLS WASN'T A SWEAT OF THE BROW
23 CASE, SO NONE OF THE NINTH CIRCUIT DECISIONS THAT LAY OUT THE
24 DECISION ALGORITHM, IF YOU WILL, FOR YOUR HONOR HAVE BEEN
25 TRUMPED BY FEIST. AND THAT'S REALLY THE ONLY REBUTTAL THEY HAVE

1 TO THE CASES THAT WE CITE THAT SOMEHOW FEIST DID IN BASIC
2 COPYRIGHT DOCTRINE AS APPLIED TO COMPUTER PROGRAMS.

3 SO WE HAVE MR. LEE HERE, THE CORE LIBRARY LEAD
4 DESIGNER FOR ANDROID, ACKNOWLEDGING THAT DESIGNING API'S IS A
5 CREATIVE ACTIVITY. YES, ABSOLUTELY. AND HE'S TALKING ABOUT THE
6 KINDS OF API'S WE'RE DEALING WITH HERE, THESE VERY COMPLICATED,
7 ELABORATE STRUCTURES IN WHICH DESIGNERS HAVE ENORMOUS CREATIVE
8 CHOICE.

9 **THE COURT:** GIVE ME ONE EXAMPLE SO THAT IT WILL BE
10 MORE CONCRETE OF -- LET'S JUST STICK WITH API'S. AND EXPLAIN
11 WHY, IF JAVA PROGRAMMING LANGUAGE CAN BE USED BY ANYONE AS YOU
12 HAVE CONCEDED IN THE PAST, THEN WHY WOULD IT BE THAT YOU CAN
13 CLAIM A COPYRIGHT IN THE API AND GET AROUND THE NAMES AND
14 PHRASES AND THE FUNCTIONALITY PROBLEMS.

15 **MR. JACOBS:** I DON'T THINK WE HAVE ARGUED TO YOUR
16 HONOR THAT IT IS BLACK LETTER LAW THAT A NEW PROGRAMMING
17 LANGUAGE COULD NOT BE PROTECTED BY COPYRIGHT. WHAT WE HAVE SAID
18 IS WE ARE MAKING NO CLAIM FOR THE PROTECTIBILITY UNDER COPYRIGHT
19 OF THE JAVA PROGRAMMING LANGUAGE, IN AND OF ITSELF.

20 SO THE ANALYTICAL MOVE I DON'T THINK WE HAVE TO MAKE
21 IS TO SOMEHOW EXPLAIN --

22 **THE COURT:** I THINK YOU'VE SAID IN THE PAST THAT
23 ANYONE CAN USE THE JAVA PROGRESSING LANGUAGE.

24 **MR. JACOBS:** WE HAVE, BECAUSE WE MAKE NO CLAIM THAT
25 THAT IS A VIOLATION OF OUR COPYRIGHT RIGHTS.

1 **THE COURT:** THAT IS A -- ARE YOU TRYING TO RECLAIM
2 SOMETHING HERE?

3 **MR. JACOBS:** NO.

4 **THE COURT:** I'M GOING TO BE DISTURBED IF THAT'S TRUE.
5 I HEARD YOU SAY IN THE PAST JAVA PROGRAMMING LANGUAGE IS IN THE
6 PUBLIC DOMAIN AND ANYONE CAN USE IT.

7 NOW, IF YOU ARE SAYING "OH, WE'RE JUST NOT MAKING
8 THAT," THAT REMINDS ME OF AN EARLIER CASE. SO BE CLEAR ON THIS.
9 ARE YOU TAKING BACK WHAT YOU SAID EARLIER?

10 **MR. JACOBS:** I'M NOT TAKING BACK WHAT I SAID EARLIER
11 IN ANY WAY, YOUR HONOR.

12 **THE COURT:** ALL RIGHT.

13 **MR. JACOBS:** I THINK WHAT I'M SUGGESTING IS THAT WHAT
14 THE ANALYTICAL MOVE I DON'T THINK WE HAVE TO MAKE IS TO SOMEHOW
15 IN SOME DEEP TECHNICAL WAY DISTINGUISH BETWEEN A PROGRAMMING
16 LANGUAGE AND AN APPLICATION PROGRAMMING INTERFACE FOR PURPOSES
17 OF ARGUMENT WE'RE MAKING.

18 **THE COURT:** WELL, ALL RIGHT. SO --

19 **MR. JACOBS:** SO --

20 **THE COURT:** SO EXPLAIN, THEN -- LET'S GET PAST JAVA
21 PROGRAMMING LANGUAGE. IN THE SIMPLEST POSSIBLE TERMS THAT
22 SOMEONE WHO IS USED TO READING CARTOONS LIKE ME CAN UNDERSTAND,
23 WHY WOULD THE COPYRIGHT LAWS PROTECT THESE API'S?

24 **MR. JACOBS:** THE REASON COPYRIGHT LAWS WOULD PROTECT
25 THESE API'S IS -- I ACTUALLY WOULD PROBABLY START IN THE SAME

1 VERY INITIAL STARTING POINT THAT THE GOOGLE'S COUNSEL DID:
2 BASIC COPYRIGHT LAW PRINCIPLES. WHAT'S THE BEST ANALOGY IN THE
3 WORLD THAT YOU AND I ARE MORE ROUTINELY FAMILIAR WITH TO AN
4 APPLICATION PROGRAMMING INTERFACE? AND PROBABLY IT'S A DETAILED
5 PLOT OUTLINE, A VERY, VERY DETAILED PLOT OUTLINE IN WHICH THERE
6 ARE LOOPS BACK AND FORTH, IN THE WHICH THE PLOT OUTLINE SAYS:

7 "OH, WELL, LET'S GO BACK UP HERE TO REMIND
8 OURSELVES WHO MR. JONES WAS, BECAUSE WE DESCRIBED MR.
9 JONES UP HERE. AND NOW WE'RE GOING TO ACTUALLY TELL
10 YOU A LITTLE BIT ABOUT WHAT MR. JONES DID IN THIS
11 NARRATIVE FLOW."

12 AND THE IMPLEMENTATION OF THAT PLOT OUTLINE, THE
13 ANALOGY TO THE CODE WOULD BE THE ACTUAL NOVEL ITSELF. THE
14 APPLICATION PROGRAM INTERFACES, AS PROFESSOR MITCHELL MAKES
15 CLEAR IN HIS DECLARATION, IS BEST SEEN AS A KIND OF A GUIDE, A
16 ROADMAP TO THE COMPUTER PROGRAM ITSELF.

17 AND IN THE CASE OF THE JAVA API'S WE'RE TALKING
18 ABOUT, I TRIED TO EMPHASIZE THE COMPLEXITY OF THIS PLOT OUTLINE,
19 BECAUSE IT'S NOT MERELY A LINEAR PLOT OUTLINE, A, B, C, D.
20 THERE ARE -- IT'S A WEB OF INTERRELATIONSHIPS AND A WEB OF
21 DEPENDENCIES.

22 THIS MAY BE BEST SEEN ON THE SLIDE THAT I HAVE BEFORE
23 YOUR HONOR RIGHT NOW, WHICH IS SLIDE SEVEN IN THE DECK WE GAVE
24 YOU.

25 **THE COURT:** OKAY.

1 **MR. JACOBS:** THIS IS -- SO WHAT WE'RE LOOKING AT HERE
2 IS -- FIRST OF ALL, IT'S AN EXHIBIT IN THE PAPERS. BUT WE'RE
3 LOOKING AT WHAT WOULD HAPPEN IF YOU WENT TO THE SUN-NOW-ORACLE
4 WEBSITE AND LOOKED AT THE JAVA SPECIFICATIONS, THE JAVA API.

5 AND THIS IS ONE OF THE MORE BASIC ONES. IT'S
6 CALLED -- IT'S A PACKAGE, SO PACKAGE IS THE LARGEST UNIT IN
7 JAVA. IT'S A COLLECTION OF CLASSES, INTERFACES, CONSTRUCTORS.

8 AND, IN PARTICULAR, ONE OF THE VERY INTERESTING
9 ASPECTS OF THE JAVA APPLICATION PROGRAM INTERFACE IS THIS
10 CONCEPT CALLED "AN INTERFACE" WITH A CAPITAL I.

11 AND AN INTERFACE IS NOT JUST CREATED AS A WAY TO GET
12 ACCESS TO UNDERLYING SERVICES. AN INTERFACE MAY BE BEST THOUGHT
13 OF AS A KIND OF A CONCORDANCE OR INDEX TO THE COMPUTER PROGRAM.

14 SO THE WIKIPEDIA METAPHOR IS PRETTY GOOD. WE HAVE
15 HUMANS AND BIRDS. WE BOTH WHISTLE. SO HUMANS MIGHT BE IN ONE
16 CLASS. BIRDS MIGHT BE IN ANOTHER CLASS. BUT WE WOULD CREATE AN
17 INTERFACE CALLED "WHISTLE" TO COLLECT IN A CONVENIENT PLACE FOR
18 THE PROGRAMMER THOSE CLASSES OF THINGS THAT WHISTLE.

19 AND SO IN PACKAGE IF YOU GO TO THE DOCUMENTATION ON
20 THE WEBSITE YOU'LL SEE "PACKAGE JAVA.UTIL." AND YOU'LL SEE A
21 LIST OF INTERFACES THAT THE CREATIVE DEVELOPERS OF THE JAVA API
22 IN QUESTION WROTE TO MAKE MORE EASILY -- TO MORE EASILY DESCRIBE
23 TO PROGRAMMERS WHAT SOME OF THE UNDERLYING SERVICES ARE.

24 SO THIS IS ON -- NOW ON THE LEFT WE HAVE THE ORACLE
25 JAVA PACKAGE JAVA.UTIL.

1 AND THEN, ON THE RIGHT WE HAVE WHAT YOU WOULD SEE IF
2 YOU SENT TO THE ANDROID DOCUMENTATION. AND WHAT YOU SEE IF YOU
3 GO TO THE ANDROID DOCUMENTATION, AGAIN, RIGHT ON THE WEBSITE
4 YOU'LL SEE "PACKAGE JAVA.UTIL." YOU'LL SEE THESE INTERFACES
5 LISTED. AND YOU'LL SEE AS YOU START GOING THROUGH IT EXACT LINE
6 FOR LINE IDENTITY.

7 NOW, THERE WAS NOTHING THAT -- NO ONE REQUIRED --
8 THERE'S NOTHING THAT REQUIRED THE CREATION OF THESE PARTICULAR
9 INTERFACES. THERE WAS NO MANDATE, NO ISSUE, NO DEMAND ON HIGH:

10 "THOU SHALT HAVE A COLLECTION INTERFACE, AND IT
11 SHALL BE NAMED 'COLLECTION,' AND IT SHALL BE IN
12 PACKAGE JAVA.UTIL."

13 THAT WAS QUINTESENTIALLY THE CHOICE OF THE API
14 DESIGNER. QUINTESENTIALLY THE CHOICE OF THE API DESIGNER.

15 AND WHAT YOU SEE HAPPENING OVER ON THE RIGHT IS THERE
16 IS A WHOLESALE TAKING BY GOOGLE FOR ITS OWN COMMERCIAL BENEFIT
17 OF THIS WORK OF THE JAVA PROGRAMMERS.

18 AND BECAUSE THERE'S THIS COMPATIBILITY ISSUE HAS COME
19 UP WE HAVE TO SPEND A MINUTE ON IT. IT'S REALLY A KIND OF A
20 PILLAGING THAT HAS HAPPENED HERE, BECAUSE WHAT GOOGLE HAD THE
21 LEGAL RIGHT TO DO WAS IMPLEMENT A FULLY COMPATIBLE VERSION IF IT
22 HAD TAKEN THE REQUISITE LICENSES. AND WE'RE NOT TALKING ABOUT
23 THE NEGOTIATION BACK AND FORTH. WE'RE TALKING ABOUT BASIC JAVA
24 LICENSES. THEY CAN CREATE FULLY COMPATIBLE VERSION.

25 BUT WHAT THEY DID INSTEAD WAS TAKE THE PARTS THEY

1 WANTED TO HIGHJACK THE DEVELOPER COMMUNITY OVER TO ANDROID. AND
2 THAT IS WHY WE ARE SO VIGOROUSLY ASSERTING A COPYRIGHT CLAIM IN
3 THIS ACTION. THERE ARE PEOPLE THAT HAVE USED THE JAVA
4 PROGRAMMING LANGUAGE FOR IONS. THE PROGRAMMING LANGUAGE FOR
5 IONS THAT HAVE NOT SOUGHT TO HIGHJACK THE INVESTMENT THAT
6 SUN-NOW-ORACLE MADE.

7 AND SO WE MAKE NO CLAIM ABOUT THE JAVA PROGRAMMING
8 LANGUAGE. NO ONE HAS DONE WHAT GOOGLE DID AND JUST WHOLESALE
9 TAKE THE API'S FOR THIS AMOUNT OF COMMERCIAL BENEFIT.

10 **THE COURT:** ON YOUR SLIDE SEVEN.

11 **MR. JACOBS:** YES.

12 **THE COURT:** WHICH RIGHT IN THE MIDDLE OF THE PAGE
13 UNDER "INTERFACE SUMMARY," THERE'S THE WORD "COLLECTION" WITH
14 BRACKET E. YOU SEE THAT?

15 **MR. JACOBS:** YES.

16 **THE COURT:** ALL RIGHT. AND THAT WORD "COLLECTION"
17 BRACKET E, WHAT IS THAT?

18 **MR. JACOBS:** THAT IS AN INTERFACE. SO "COLLECTION"
19 IS THE NAME OF THE INTERFACE, AND I BELIEVE THE E IS THE FIELD.

20 **THE COURT:** ALL RIGHT. SO ARE YOU CLAIMING COPYRIGHT
21 ON THE WORD "COLLECTION"?

22 **MR. JACOBS:** NO.

23 **THE COURT:** ALL RIGHT. SO WHAT IS IT THAT -- EXPLAIN
24 WHAT YOU ARE CLAIMING A COPYRIGHT ON, THE DEAL WITH THE WORD
25 "COLLECTION" OR THAT LINE ITEM.

1 **MR. JACOBS:** WE ARE CLAIMING COPYRIGHT PROTECTION
2 CONSISTENT WITH BASIC COPYRIGHT PRINCIPLES ON THE SELECTION,
3 COORDINATION AND ARRANGEMENT OF WHAT MIGHT IN ISOLATION, SUCH AS
4 THE WORD "COLLECTION," WOULD IN ISOLATION BE UNPROTECTABLE.

5 WE ARE CLAIMING THAT WHAT THE DESIGNERS DID IN
6 ARCHITECTING THIS ELABORATE SET OF INTERFACES WITH THEIR
7 DEPENDENCIES AND THE RELATIONSHIPS TO EACH OTHER WAS FAR MORE
8 THAN JUST LIST IN ALPHABETICAL ORDER IN DICTIONARY FORM THE WORD
9 "COLLECTION" FOLLOWED BY THE NEXT WORD, FOLLOWED BY THE NEXT
10 WORD.

11 INSTEAD, THIS WAS CREATIVE ARTISTRY. AND SO IN THAT
12 COLLECTION OF THE 37 PACKAGES THAT ARE AT ISSUE, IN THAT
13 STRUCTURING, IN THAT SEQUENCING, IN THAT ORGANIZATION LIES
14 CREATIVE EXPRESSION. AND CONSISTENT WITH BASIC COPYRIGHT
15 PRINCIPLES, THE DECISION OF CONGRESS THAT WE'VE BEEN WORKING
16 WITH FOR THE LAST 30 PLUS YEARS TO PROTECT COMPUTER PROGRAMS AS
17 LITERARY WORKS, THERE'S API'S ARE PROTECTABLE.

18 IF IT WASN'T LABELED AN API, THERE WOULD BE NO
19 QUESTION THAT 11,000 PAGES THAT SOMEBODY HAD GIVEN SOME THOUGHT
20 TO WOULD BE PROTECTABLE UNDER COPYRIGHT. YOU COULDN'T JUST COPY
21 IT.

22 **THE COURT:** WAIT. JUST STICK WITH COLLECTION FOR A
23 SECOND. SO COLLECTION IS JUST ONE API, RIGHT? AM I RIGHT ABOUT
24 THAT?

25 **MR. JACOBS:** IT IS AN INTERFACE, YES. I THINK THE

1 TERMINOLOGY IS A LITTLE COMPLICATED IN THE WORLD OF JAVA. IT IS
2 AN INTERFACE IN THE PACKAGE JAVA.UTIL.

3 **THE COURT:** ALL RIGHT. SO EXPLAIN HOW THEN THE WORD
4 "COLLECTION" BRACKET E GETS USED AND IGNORE ALL THESE OTHER
5 COMPARATORS. I JUST WANT TO UNDERSTAND HOW ONE OF THESE GETS
6 USED BEFORE YOU GET INTO HOW THEY ARE ALL USED TOGETHER.

7 **MR. JACOBS:** MEANING "USED" IN WHICH SENSE? USED IN
8 THE CASE OF THE JAVA DEVELOPER --

9 **THE COURT:** ALL RIGHT.

10 **MR. JACOBS:** -- IT'S USED TO CREATE AN INTERFACE.
11 AND IT HAPPENS TO HAVE THE MEANING HERE OF THE REINTERFACE IN
12 THE COLLECTION HIERARCHY. AND THAT COLLECTION HIERARCHY, AS I
13 UNDERSTAND IT, IS SOMEWHERE OFF TO THE SIDE, NOT NECESSARILY
14 VISIBLE ON THIS PAGE.

15 BUT WHAT WE'VE DONE IN PACKAGE JAVA.UTIL IS CREATE A
16 COLLECTION INTERFACE SO THAT WE CAN GET TO THIS THING THAT'S
17 OVER ON THE SIDE WHEN YOU'RE WORKING WITH THE PACKAGE JAVA.UTIL.

18 **THE COURT:** OKAY.

19 **MR. JACOBS:** SO --

20 **THE COURT:** ALL RIGHT. LET ME HEAR FROM MR. SWOOPES.

21 **MR. JACOBS:** YES.

22 THANK YOU, YOUR HONOR.

23 **MR. SWOOPES:** THANK YOU, YOUR HONOR.

24 **THE COURT:** WHICH PART WILL YOU BE ADDRESSING?

25 **MR. SWOOPES:** I WILL BE ADDRESSING THE LITERAL

1 COPYING IN THIS CASE, YOUR HONOR.

2 **THE COURT:** THE WHAT?

3 **MR. SWOOPES:** LITERAL COPYING OF SOURCE CODE AND
4 RELATED MATERIALS.

5 YOUR HONOR, GOOGLE'S LITERAL COPYING IS OBVIOUS TO
6 MOST ANY AUDIENCE. THE PARTIES DO NOT DISAGREE ON THE STANDARDS
7 THAT SHOULD BE APPLIED IN EVALUATING WHETHER GOOGLE'S COPYING IN
8 THIS CASE OF LITERAL SOURCE CODE AND COMMENTS IS DE MINIMIS.

9 IN FACT, WE CITE SOME OF THE SAME CASES. ORACLE PUTS
10 FORTH THE PROPOSITION THAT COPYING IS DE MINIMUS ONLY WHERE THE
11 AVERAGE AUDIENCE WOULD NOT RECOGNIZE THE APPROPRIATION.

12 WELL, IF WE LOOK AT THIS SLIDE OF THE CLASS
13 POLICYNODEIMPL, YOU SEE THAT IT IS NEARLY IDENTICAL ON A
14 LINE-BY-LINE BASIS.

15 GOOGLE DOES NOT SERIOUSLY DISPUTE THAT THIS CAME FROM
16 ANYTHING OTHER THAN DECOMPILATION, THAT IS TRANSLATING FROM
17 MACHINE READABLE OBJECT CODE INTO HUMAN READABLE SOURCE CODE.
18 SO THAT'S A SIMPLE QUESTION.

19 GOGGLE PUTS FORTH THE PROPOSITION, HOWEVER, THAT
20 COPYING IS DE MINIMIS IF THE COPYING IS QUANTITATIVELY AND
21 QUALITATIVELY INSIGNIFICANT. WELL, BASED ON THE EXPERT REPORTS
22 THAT YOUR HONOR HAS SEEN, THAT'S A QUESTION OF FACT. THE PARTIES
23 SHARPLY DISAGREE OVER WHETHER THIS COPYING IS QUANTITATIVELY AND
24 QUALITATIVELY SIGNIFICANT. BUT THE FACT IS THAT GOOGLE HAS
25 COPIED HUNDREDS OF LINES OF CODE, VERY MUCH LIKE WHAT IS ON THE

1 SCREEN RIGHT NOW. AND THEY WANT TO ARGUE THAT THIS IS NOT
2 ACTIONABLE JUST BECAUSE IT IS PACKAGED WITH A LARGER GROUP OF
3 CODE. THAT CAN'T BE RIGHT.

4 **THE COURT:** SO THE ONE YOU HAVE ON THE SCREEN ON THE
5 LEFT SIDE, WHAT IS THAT? IS THAT -- THAT'S THE JAVA VERSION?

6 **MR. SWOOPES:** YES, YOUR HONOR. THAT IS A VERSION OF
7 CODE, OF MACHINE READABLE OBJECT CODE FROM THE ORACLE CLASS
8 LIBRARY THAT HAS BEEN RUN THROUGH A DECOMPLIER PROGRAM TO
9 GENERATE HUMAN READABLE SOURCE CODE.

10 TO THE RIGHT-HAND SIDE WE SEE SOURCE CODE FROM THE
11 ANDROID PUBLIC WEBSITE THAT CORRESPONDS NEARLY IDENTICALLY ON A
12 LINE-BY-LINE BASIS.

13 **THE COURT:** IS EVERYTHING ON THE LEFT SIDE, IS THAT
14 COPYRIGHTED?

15 **MR. SWOOPES:** YES, IT IS, YOUR HONOR.

16 **THE COURT:** I COULD GO TO THE REGISTRATION OFFICE,
17 COPYRIGHT REGISTRATION OFFICE AND FIND THAT DOCUMENT SOMEPLACE?

18 **MR. JACOBS:** YOU WOULD NOT FIND THIS DOCUMENT LISTED
19 INDIVIDUALLY, YOUR HONOR. YOU WOULD FIND IT AS PART OF THE JAVA
20 STANDARD EDITION VERSION FIVE DEVELOPMENT KIT.

21 RATHER THAN ISSUING -- EXCUSE ME. RATHER THAN
22 REGISTERING THOUSANDS OF INDIVIDUAL PROGRAM FILES,
23 SUN-NOW-ORACLE REGISTERED THESE WORKS INDIVIDUALLY. AND, INDEED,
24 COPYRIGHT REGULATIONS ALLOW AND ENCOURAGE THIS. GOOGLE
25 MISCONSTRUES THESE REGULATIONS WHICH SAY FOR THE PURPOSE OF

1 REGISTRATION A SINGLE APPLICATION AND A SINGLE FEE MAY BE PAID.

2 NOW, GOOGLE'S ARGUMENT IS THAT THIS SOMEHOW MEANS
3 THAT WE NEED TO LOOK AT THE ENTIRE WORK, AND THAT THIS IS ONLY
4 AN INFINITESIMALLY SMALL AMOUNT OF THE LINES OF CODE.

5 BUT NO ONE COULD BE EXPECTED TO REGISTER THOUSANDS OF
6 PROGRAM FILES. THE APPLICANT WOULDN'T WANT IT. THEY COULD NEVER
7 AFFORD A FEE IF THEY PUT OUT A COMPLEX SET OF PROGRAMS LIKE THE
8 JAVA DEVELOPMENT KIT.

9 AND THE COPYRIGHT OFFICE WOULD NOT WANT TO PROCESS
10 THOUSANDS AND THOUSANDS OF REGISTRATIONS FOR INDIVIDUAL PROGRAM
11 FILES.

12 **THE COURT:** HOW IS THE PUBLIC SUPPOSED TO KNOW WHAT
13 IS COPYRIGHTED UNLESS THERE'S A COPY OF THAT AVAILABLE AT THE
14 COPYRIGHT OFFICE?

15 **MR. SWOOPES:** WELL, YOUR HONOR, THERE IS A COPY OF
16 PART OF THE CODE. THE COPYRIGHT OFFICE REQUIRES A DEPOSIT OF A
17 PORTION OF THE SOURCE CODE FOR ANY COMPUTER PROGRAM. BUT THE
18 COPYRIGHT OFFICE -- CONGRESS AND THE COPYRIGHT OFFICE MADE A
19 POLICY DECISION TO NOT REQUIRE THE ENTIRETY OF THE SOURCE CODE
20 TO BE DEPOSITED SIMPLY BECAUSE THEY WOULD NOT BE ABLE TO PROCESS
21 EVERYTHING.

22 SO THAT'S WHY YOU ONLY HAVE TO DEPOSIT A LIMITED
23 NUMBER OF PAGES WHEN YOU GO TO REGISTER A COMPUTER PROGRAM,
24 REGARDLESS OF ITS SIZE.

25 **THE COURT:** IS THAT DISPUTED IN THIS CASE, OR DO BOTH

1 SIDES AGREE WITH WHAT YOU JUST SAID?

2 **MR. SWOOPES:** GOOGLE HAS NOT DISPUTED THAT ORACLE HAS
3 REGISTERED AND HAS PRESENTED VALID REGISTRATIONS FOR THE
4 COPYRIGHTED WORKS AT ISSUE IN THIS CASE.

5 **THE COURT:** OKAY. ALL RIGHT. SO GO BACK TO THE
6 SIDE-BY-SIDE COMPARISON FOR A SECOND.

7 **MR. SWOOPES:** YES, YOUR HONOR.

8 **THE COURT:** SO YOU'RE TELLING ME THAT GOOGLE
9 ACKNOWLEDGES THAT WHAT'S ON THE LEFT SIDE OF THIS SCREEN IS
10 COPYRIGHTED?

11 **MR. SWOOPES:** YES, YOUR HONOR.

12 **THE COURT:** AND THEN, ON THE RIGHT SIDE WHILE I CAN
13 LOOK AT IT IT LOOKS ALMOST IDENTICAL. THAT PART LOOKS CORRECT.
14 SO WHAT DOES GOOGLE SAY BY WAY OF DEFENSE WHY THIS WOULD NOT BE
15 INFRINGEMENT?

16 **MR. SWOOPES:** GOOGLE HAS TWO MAIN ARGUMENTS, YOUR
17 HONOR. THEY ARGUE THAT BECAUSE THE WORK IS PACKAGED WITH
18 THOUSANDS OF OTHER PROGRAM FILES THAT COPYING ONLY A FEW IS
19 INSIGNIFICANT. BUT IF A PERSON WERE TO COPY A CHAPTER OUT OF A
20 NOVEL, FOR INSTANCE, YOUR HONOR, A NOVEL WHICH COULD HAVE MANY
21 CHAPTERS, IT WOULD STILL BE COPYRIGHT INFRINGEMENT REGARDLESS OF
22 WHETHER THIS IS AN INDIVIDUAL WORK OR WHETHER THIS IS --

23 **THE COURT:** WHAT IF YOU HAD A FOOTNOTE IN A HISTORY
24 BOOK THAT WAS ALMOST WORD FOR WORD, BUT WITH A FEW WORDS WERE
25 CHANGED.

1 **MR. SWOOPES:** THAT WOULD STILL BE COPYRIGHT
2 INFRINGEMENT AS LONG AS --

3 **THE COURT:** ARE YOU SURE OF THAT?

4 **MR. SWOOPES:** IT COULD BE COPYRIGHT INFRINGEMENT AS
5 LONG AS THERE WAS ACTUAL ORIGINAL EXPRESSION WITHIN THAT
6 FOOTNOTE. AND THAT NEEDS TO BE JUDGED ON A CASE-BY-CASE BASIS.
7 AND THAT WOULD BE A QUESTION OF FACT WHEREAS EXPERT TESTIMONY
8 WOULD BE USEFUL. AND AS I STATED, THE EXPERTS DIFFER SHARPLY AS
9 TO THE SIGNIFICANCE OF --

10 **THE COURT:** WHAT IF IN THIS HISTORY BOOK IT GAVE
11 ATTRIBUTION?

12 **MR. SWOOPES:** GIVING ATTRIBUTION WOULD NOT SAVE
13 GOOGLE FROM COPYRIGHT INFRINGEMENT OR WOULD NOT SAVE A COPIER
14 FROM COPYRIGHT INFRINGEMENT UNLESS THEY HAD THE AUTHOR'S
15 PERMISSION.

16 **THE COURT:** WHAT IF IT'S FAIR USE?

17 **MR. SWOOPES:** IS THAT A --

18 **THE COURT:** HISTORIANS CITE EACH OTHER ALL THE TIME,
19 AND THEY ARE NOT REQUIRED TO GET CONSENT. IF THAT WAS REQUIRED
20 THAT WOULD BE A CLOG ON HISTORY. YOU'RE NOT REQUIRED TO GO TO
21 ANOTHER HISTORIAN. THEY MAY EVEN BE DEAD. YOU'RE NOT REQUIRED
22 TO GO TO ANOTHER HISTORIAN AND SAY:

23 "CAN I CITE TO YOUR BOOK?" THAT'S RIDICULOUS.
24 WHERE DID YOU GET THAT IDEA?

25 **MR. SWOOPES:** IT'S TRUE, YOUR HONOR, THAT IT IS NOT

1 NECESSARY TO CITE THE END COPYRIGHTABLE IDEAS OF OTHER --

2 **THE COURT:** TO QUOTE SOMEBODY IN A HISTORY BOOK AND
3 SAY:

4 "PROFESSOR X CONTENDS AS FOLLOWS: A, B, C. THE
5 CIVIL WAR, BLAH, BLAH, BLAH. CITE TO A HISTORY
6 BOOK."

7 YOU CAN DO THAT ALL DAY LONG. THAT'S FAIR USE. AND IF
8 YOU ARE TRYING TO CLAIM THAT YOU HAVE THAT KIND OF RIGHT ON
9 HISTORY YOU ARE GOING TO LOSE THIS CASE.

10 NOW, MAYBE COPYRIGHTS ARE DIFFERENT. WHEN IT COMES
11 TO PROGRAM CODE WHAT YOUR TELLING ME ON FAIR USE AND HISTORY
12 BOOKS IS TOTALLY WRONG.

13 **MR. SWOPES:** INDEED, YOUR HONOR, THEY ARE DIFFERENT.
14 AND EVERY CASE IS DIFFERENT. FAIR USE IS A MIXED QUESTION OF
15 LAW AND FACT WHICH NEEDS TO BE LOOKED AT ON AN INDIVIDUAL BASIS.
16 AMONG OTHER THINGS, THE USE --

17 **THE COURT:** WHY COULDN'T A JURY LOOK AT THAT AND SAY:

18 "LOOK WHAT YOU'VE GIVEN ME." AND SAY OUT OF
19 11,000 LINES OF CODE THERE ARE 322 THAT ARE THE SAME, AND THE
20 REST OF IT IS ORIGINAL WORKS WITH GOOGLE AND THE 320 -- YES,
21 THAT LOOKS PRETTY BAD WHAT YOU GOT UP THERE ON THE SCREEN. BUT
22 IF YOU LOOK TO THE OTHER 11,000 PAGES THEY WOULD BE TOTALLY
23 DIFFERENT.

24 AND SO, YEAH, YOU ARE GOING TO HAVE A FEW OVERLAPS.
25 FAIR USE, END OF STORY. WHAT'S WRONG WITH THAT ARGUMENT?

1 **MR. SWOOPES:** YOUR HONOR, COURTS HAVE HELD THAT IT'S
2 NO DEFENSE TO REMARK HOW MUCH ONE ADDED TO MATERIAL THAT WAS
3 COPIED. AND THAT IF IT WERE -- IF THAT WERE NOT THE CASE THEN
4 SIMPLY TAGGING ON EXTREMELY ORIGINAL --

5 **THE COURT:** HOW LONG IS IT GOING TO TAKE? YOU KNOW,
6 YOU TOLD ME YOU WILL TRY THIS CASE, BOTH SIDES, THREE WEEKS.
7 THAT'S 15 DAYS COUNTING EVERYTHING.

8 HOW MUCH OF YOUR CASE ARE YOU GOING TO TAKE UP WITH
9 THE COPYRIGHT PART? BECAUSE YOU ARE ONLY GOING TO GET HALF OF
10 THAT TIME.

11 **MR. SWOOPES:** THAT'S A FAIR QUESTION, YOUR HONOR.
12 AND I'M SURE THAT THAT ISSUE WILL BE WORKED OUT AS TIMES GOES
13 ON. BUT WHEN WE SEE SLIDES LIKE THIS --

14 **THE COURT:** IT WON'T BE WORKED OUT BY MORE TIME.
15 IT'S GOING TO BE WORKED OUT BY YOU THROWING THINGS OVERBOARD
16 THAT ARE NOT WORTH TAKING UP THE TIME OF A GOOD JURY.

17 YOU KNOW, YOUR TWO COMPANIES ONLY GIVE TWO WEEKS TO
18 YOUR EMPLOYEES FOR TRIAL. TWO WEEKS FOR YOUR EMPLOYEES. BUT
19 YOU WANT A LOT MORE THAN THAT FROM THE JURY, THE GOOD CITIZENS
20 OF THIS DISTRICT.

21 **MR. SWOOPES:** I AM AWARE OF THAT, YOUR HONOR. AND I
22 WOULD HOPE THAT WHEN YOU SEE SLIDES LIKE THIS THERE WILL NOT BE
23 MANY QUESTIONS OF FACT THAT NEED TO BE RESOLVED FOR THE JURY.

24 I WOULD LIKE TO --

25 **THE COURT:** YOU HAVE ONE GOOD SLIDE OUT OF 11,000

1 LINES. THAT'S NOT MUCH OF A CASE.

2 **MR. SWOOPES:** YOUR HONOR, THAT DOES RAISE A QUESTION
3 OF HOW THIS FITS INTO THE OVERALL CASE.

4 FIRST OF ALL, THIS IS ONLY OF LIMITED RELEVANCE IF
5 THE API'S AT ISSUE ARE NOT COPYRIGHTABLE. AND AS MR. JACOBS
6 EXPLAINED TO YOUR HONOR, THAT'S NOT THE CASE.

7 BUT WHAT IS ALSO IMPORTANT TO SHOW IS THAT GOOGLE
8 CLAIMED THAT THEY HAD A CLEAN ROOM IMPLEMENTATION.

9 **THE COURT:** THEY DID WHAT?

10 **MR. SWOOPES:** A CLEAN ROOM IMPLEMENTATION, YOUR
11 HONOR. THAT IS LOOKING AT THE UNCOPYRIGHTABLE IDEAS BEHIND THE
12 JAVA PLATFORM AND TRYING TO IMPLEMENT CODE WITHOUT -- I'M SORRY.

13 **THE COURT:** HOLD ON. SO DOESN'T THAT HELP GOOGLE?

14 **MR. SWOOPES:** ONE WOULD THINK THAT, YOUR HONOR. BUT,
15 IN FACT, THE LITERAL COPYING IN THIS CASE SHOWS THAT THE CLEAN
16 ROOM WAS NOT CLEAN.

17 **THE COURT:** MAYBE THEY GOT GOOD MEMORIES. MAYBE THEY
18 WENT IN THERE, AND THEY JUST HAPPENED TO REMEMBER THIS BECAUSE
19 THAT'S THE WAY EVERYONE WOULD DO IT.

20 **MR. SWOOPES:** WELL, YOUR HONOR, THAT ACTUALLY WOULD
21 BE COPYRIGHT INFRINGEMENT. AND IF THAT PERSON WERE TO REMEMBER
22 THE LINES OF CODE THAT, SAY, THEY HAD WRITTEN AT A PREVIOUS JOB
23 AND THERE WAS A WORK MADE --

24 **THE COURT:** THAT'S PROBABLY RIGHT.

25 **MR. SWOOPES:** -- FOR A FORMER EMPLOYER. AND THAT IS

1 EXACTLY THE CASE HERE WITH THE DEPOSITION TESTIMONY ON THE
2 SCREEN FROM MR. JOSH BLOCH WHO --

3 **THE COURT:** TELL ME WHAT HE SAID.

4 **MR. JACOBS:** WHEN ASKED WHETHER HE REMEMBERED
5 ACCESSING SUN CODE WHILE WORKING ON THE TIMSORT METHOD ON THE
6 UPPER RIGHT-HAND CORNER OF THE SCREEN, HE SAYS THAT -- HE'S
7 WILLING TO BELIEVE THAT HE DID.

8 WHAT'S ALMOST AS INTERESTING AS THE FACT THAT THERE
9 WAS COPYING, IS THE ANALYSIS THAT MR. BLOCH USES TO SAY WHY
10 THERE WAS COPYING. HE LOOKS AT THE SIMILARITY OF THE SIGNATURE,
11 THE ARGUMENTS ARE ON THE SAME ORDER, THE SAME NAMES.

12 THIS IS EXACTLY THE COPYRIGHT INFRINGEMENT ANALYSIS
13 THAT IS BEING APPLIED TO THE ENTIRE JAVA PLATFORM AS A WHOLE.
14 SO WHAT THIS SHOWS IS THAT ENGINEERS LIKE MR. BLOCH, LIKE
15 MR. TIM LINDHOLM AND OTHERS WHO USED TO WORK FOR GOOGLE --
16 EXCUSE ME -- WHO USED TO WORK FOR SUN OR ORACLE HAD ACCESS.
17 THEY USED THEIR ACCESS TO SUN'S AND ORACLE'S COPYRIGHTED
18 MATERIALS AS THEY WERE CREATING WORKS FOR THE ANDROID PLATFORM.

19 I WOULD LIKE TO IN THE LIMITED TIME THAT WE HAVE,
20 YOUR HONOR, ADDRESS ONE OTHER POINT THAT GOGGLE BROUGHT UP IN
21 ITS REPLY BRIEF THAT WE DID NOT HAVE A CHANCE TO SPEAK ABOUT
22 PREVIOUSLY. THAT IS GOOGLE MAKES THE ARGUMENT THAT THE ORACLE
23 HAD WANTED PROTECTION FOR THESE PROGRAMS AS INDIVIDUAL WORKS
24 THAT WE NEEDED TO LIST THE TITLES OF THEM.

25 WELL, JAVA TWO STANDARD EDITION VERSION FIVE WAS

1 REGISTERED IN 2004. GOOGLE RELIES ON THIS LANGUAGE STATING THAT
2 A SEPARATE CONTINUATION SHEET MUST BE USED FOR TITLES. BUT EVEN
3 IF APPLIED HERE THIS REGULATION WAS ONLY ISSUED IN 2007, THREE
4 YEARS AFTER THE COPYRIGHTED VERSION OF THE JAVA PLATFORM, OR AT
5 LEAST VERSION FIVE AND PREVIOUS VERSIONS WERE REGISTERED. SO
6 THIS IS INAPPOSITE.

7 **THE COURT:** WELL, WHERE DOES IT SAY THAT, THAT IT'S
8 NOT RETROACTIVE?

9 **MR. SWOPES:** YOUR HONOR, I DON'T BELIEVE WE HAVE ON
10 THE SCREEN THAT IT IS NOT RETROACTIVE. WHAT WE HAVE HERE IS AN
11 INDICATION THAT THIS PROVISION WAS ADDED ON JULY 6, 2007.

12 **THE COURT:** OKAY. ALL RIGHT. I SEE YOUR POINT.

13 **MR. SWOPES:** AND THE CODE THAT -- AND THE REGULATION
14 THAT WAS ON HAND BEFORE THAT FOLLOWED TRADITIONAL COPYRIGHT
15 PRINCIPLES THAT'S ALLOWED FOR REGISTRATION AS A SINGLE WORK. AND
16 OTHER THAN THEIR ARGUMENT WITH ITS REGULATION GOOGLE DOES NOT
17 DISPUTE THE ANALYSIS CITED IN ORACLE'S BRIEF, ORACLE'S
18 OPPOSITION BRIEF, FROM BEAN V. MCDUGAL AND SOME OTHER CASES
19 WHICH STATE THAT IF YOU HAVE A SINGLE WORK THAT IS REGISTERED
20 YOU CAN SUE ON THE INDIVIDUAL COPYRIGHTED ELEMENTS.

21 **THE COURT:** DO THIS FOR ME. I WANT TO GIVE YOU A
22 MOMENT TO -- I KNOW THERE'S SO MUCH. THERE'S SO MANY ITEMS THAT
23 YOU ARE CLAIMING WERE INFRINGED THAT THERE'S A FOREST FOR THE
24 TREES PROBLEM FOR ME, NOT FOR YOU. YOU'RE DOING A GOOD JOB
25 EXPLAINING IT. BUT DO THIS FOR ME.

1 JUST PRETEND THAT YOU'RE MAKING THE OPENING STATEMENT
2 TO THE JURY. AND JUST TAKE ONE EXAMPLE. YOU CAN USE EVEN THAT
3 EXAMPLE YOU HAD UP THERE A MINUTE AGO, BUT JUST PRETEND YOU'RE
4 WALKING THE JURY THROUGH WHAT YOUR ARGUMENT IS AND WHY THERE'S
5 INFRINGEMENT AND WHAT THE LAW IS. AND THEN, EXPLAIN WHY THE
6 DEFENSES DON'T APPLY. IT STILL IS A LITTLE FUZZY TO ME, BOTH
7 SIDES HAVING SUCH GOOD LAWYERS. SO DO THAT FOR ME.

8 PUT SOMETHING HERE. THE ONE YOU GOT UP THERE, SO
9 PRETEND THAT YOU ARE EXPLAINING TO SOMEBODY ON THE JURY WHY
10 THAT'S INFRINGEMENT. AND IT'S NOT ENOUGH JUST TO SAY THAT THEY
11 ARE IDENTICAL. YOU ARE GOING TO HAVE TO EXPLAIN WHY IT'S
12 COPYRIGHTABLE IN THE FIRST PLACE.

13 SO EXPLAIN THAT.

14 **MR. SWOOPES:** YES, YOUR HONOR. I'M HAPPENING TO PLAN
15 THIS SLIDE I SHOULD POINT OUT THAT MR. JACOBS HAS AN ADDITIONAL
16 SLIDE THAT TALKS ABOUT THE COPYING THAT OCCURS AT MULTIPLE
17 LEVELS WITHIN THE JAVA PLATFORM.

18 HERE YOU SEE THE SOURCE CODE LEVEL. AND THIS IS
19 FAIRLY OBVIOUS TO ANYONE WHO JUST LOOKS AT A PROGRAM AS A
20 LITERARY --

21 **THE COURT:** IT'S NOT OBVIOUS THAT IT'S COPYRIGHTABLE.

22 **MR. JACOBS:** THAT'S A FAIR POINT, YOUR HONOR.

23 **THE COURT:** EXPLAIN THAT POINT.

24 **MR. SWOOPES:** THIS MATERIAL'S COPYRIGHTABLE AS A
25 LITERARY WORK BECAUSE LIKE ANY OTHER PIECE OF TEXT, YOU HAVE

1 ORIGINAL EXPRESSION IN THIS CASE IN WRITTEN INSTRUCTIONS TO A
2 COMPUTER AS TO HOW TO CARRY OUT A TASK.

3 THERE'S INFRINGEMENT HERE BECAUSE EVEN WHERE YOU DID
4 NOT NEED TO DO THE SAME THING AND, IN GENERAL, YOU DIDN'T NEED
5 TO DO THE SAME THING, THERE IS DIRECT SIMILARITIES.

6 THE HIGHLIGHTED VARIABLE NAMES YOU SEE "SET, SET, SET
7 ONE," THIS IS WHAT HAPPENS WHEN YOU USE AN AUTOMATED TOOL TO
8 TAKE SOMEONE'S ORIGINAL EXPRESSION AND SPIT OUT VARIABLE NAMES
9 THAT ARE GENERATED BY A MACHINE RATHER THAN COMING UP WITH MORE
10 DESCRIPTIVE NAMES THAT THE DEVELOPER WOULD DO THEMSELVES.

11 I BELIEVE MR. JACOBS HAS SOME ADDITIONAL MATERIAL
12 THAT MAY SHED LIGHT ON COPYING AT DIFFERENT LEVELS WITHIN THE
13 JAVA PLATFORM.

14 **THE COURT:** WELL, WE WILL COME TO THAT LATER, MAYBE.
15 ALL RIGHT. LET'S GIVE THE OTHER SIDE A CHANCE TO
16 RESPOND.

17 **MR. SWOOPES:** THANK YOU, YOUR HONOR.

18 **THE COURT:** PUT THAT SCREEN BACK UP THERE. WHY ISN'T
19 THAT JUST BLATANT COPYRIGHT INFRINGEMENT RIGHT THERE? LET'S
20 STICK WITH THIS ONE FOR A MINUTE.

21 **MR. BABER:** SURE. IT'S NOT BLATANT COPYRIGHT
22 INFRINGEMENT, YOUR HONOR, BECAUSE THIS HAS TO BE VIEWED IN THE
23 CONTEXT OF THE COPYRIGHT CLAIM IN THIS CASE.

24 ORACLE HAS CHOSEN TO PICK THE COPYRIGHT FIGHT BY
25 PUTTING ON THE TABLE AS ITS ASSERTED WORK THE ENTIRE JAVA

1 STANDARD EDITION PLATFORM.

2 IT IS A WORK THAT CONSISTS OF THOUSANDS OF FILES,
3 MILLIONS OF LINES OF CODE. IT INCLUDES A VIRTUAL MACHINE. IT
4 INCLUDES A DEVELOPER KIT. IT INCLUDES A COMPILER, SOME OF THE
5 TERMS YOU'VE HEARD IN THE PATENT SIDE OF THIS CASE. THAT'S ALL
6 PART OF THE WORK.

7 **THE COURT:** BUT IT IS TRUE THAT IF YOU COPY
8 SOMEBODY'S CHAPTER OUT OF A VERY LONG BOOK ISN'T THAT STILL
9 COPYRIGHT INFRINGEMENT?

10 **MR. BABER:** IT COULD BE, YOUR HONOR. THERE WOULD BE
11 QUESTIONS. AND IF THIS WAS THE ONLY ISSUE, IF THEY WERE SUING US
12 JUST FOR THESE EIGHT FILES THAT WERE REMOVED FROM ANDROID ONCE
13 THEY WERE IDENTIFIED TO US, THEN WE WOULDN'T BE MOVING FOR
14 SUMMARY JUDGMENT. THERE WOULD BE OTHER COPYRIGHT ISSUES WE
15 WOULD RAISE ABOUT THESE FILES AND ABOUT WHETHER THEY ARE
16 PROTECTED, BUT WE WOULDN'T BE MOVING FOR SUMMARY JUDGMENT.

17 BUT FOR THE PURPOSES OF THIS CLAIM AND THE WAY THEY
18 HAVE CHOSEN TO PLEAD IT, THE NINTH CIRCUIT HAS SAID NEWTON
19 VERSUS DIAMOND IN THE SAMPLING CASE, THEY SAID IN APPLE VERSUS
20 MICROSOFT OVER AND OVER AGAIN YOU TAKE THE WORKS. FIRST YOU PUT
21 OUT OF THE EQUATION PARTS THAT ARE NOT COPYRIGHTABLE. AND THEN,
22 YOU PERFORM YOUR INFRINGEMENT ANALYSIS UNDER EITHER THE
23 SUBSTANTIAL SIMILARITY TEST OR THE VIRTUAL IDENTITY TEST BY
24 COMPARING THE WORKS AS A WHOLE. THE WORKS AS A WHOLE.

25 THEY COULD HAVE GONE OUT AND GOTTEN THE INDIVIDUAL

1 COPYRIGHT REGISTRATIONS LIKE YOU ASKED ABOUT FOR ANY OF THESE
2 SPECIFIC FILES.

3 THEY COULD HAVE SAID:

4 "WE ARE SUING YOU NOT JUST ON THE WHOLE
5 PLATFORM, BUT WE'RE SUING YOU ON THESE EIGHT --

6 **THE COURT:** COULD A REASONABLE JURY LOOKING AT
7 EVERYTHING AND SEEING THIS IDENTITY HERE AND THE OTHER EIGHT
8 FILES, COULD THEY SAY THAT EVEN COMPARATIVE WORKS AS A WHOLE
9 THAT THERE'S BEEN INFRINGEMENT?

10 **MR. BABER:** I DON'T BELIEVE SO, YOUR HONOR. AND AS A
11 MATTER OF LAW THEY COULD NOT BECAUSE THESE EIGHT FILES ARE EIGHT
12 OUT OF A THOUSAND FILES IN THE API PACKAGES. THEY ARE EIGHT OUT
13 OF 50,000 FILES IN ANDROID. THESE ARE SEVERAL HUNDRED LINES OF
14 CODE OUT OF 11 MILLION LINES OF CODE IN ANDROID.

15 **THE COURT:** BUT IF THERE ARE OTHERS, WHY DIDN'T YOU
16 JUST CHANGE THESE TWO?

17 **MR. BABER:** WE DID. THAT'S THE POINT, YOUR HONOR. AS
18 SOON AS ORACLE SAID:

19 "HEY, WAIT. THERE'S THESE EIGHT FILES IN THERE.

20 DID YOU KNOW ABOUT THAT?"

21 WE LOOKED AT THEM, YOUR HONOR. FRANKLY, IT'S NOT IN
22 RECORD. WE DON'T NEED THEM FOR SUMMARY JUDGMENT. IT WAS A
23 MISTAKE. SOMEBODY THOUGHT THESE WERE APACHE HARMONY FILES FROM
24 THE INDEPENDENT IMPLEMENTATION OF THE API'S, AND THEY MADE THEIR
25 WAY IN THERE. BUT AS SOON AS THEY IDENTIFIED THEM, WE TOOK THEM

1 OUT. WE HAVEN'T REPLACED THEM. THERE'S NO SENSE IN WHICH THEY
2 COULD BE IMPORTANT TO ANDROID.

3 **THE COURT:** THESE DON'T EVEN EXIST ANYMORE?

4 **MR. BABER:** THEY ARE GONE. THEY ARE OUT. NOT ONLY
5 ARE THEY OUT NOW, BUT THE EVIDENCE WILL SHOW AND DOES SHOW THAT
6 THESE WOULD NEVER HAVE EVEN BEEN SHIPPED ON ANY DEVICES.

7 THEY WERE TEST FILES. IN ORDER FOR A VERY, VERY, VERY
8 SMALL AMOUNT OF COPYING TO BE ACTIONABLE, AND THE COURTS HAVE
9 RECOGNIZED FOR HUNDREDS OF YEARS THAT NOT ALL IDENTICAL THINGS
10 GIVE RISE TO A COPYRIGHT INFRINGEMENT CLAIM. IT HAS TO BE
11 QUANTITATIVELY AND QUALITATIVELY IMPORTANT.

12 WHAT WE ARE TALKING --

13 **THE COURT:** WHAT DAMAGES ARE BEING SOUGHT FOR THIS
14 INFRINGEMENT THAT DOESN'T EXIST ANYMORE?

15 **MR. BABER:** WELL, YOUR HONOR, THAT'S AN INTERESTING
16 THING ABOUT THIS BECAUSE, FRANKLY, WHAT WE THINK WE SEE COMING
17 IS THAT THIS COPYRIGHT TAIL IS STARTING TO TRY TO WAG THE DOG.

18 WE RECEIVED PROFESSOR COCHRAN'S NEW EXPERT DAMAGES
19 REPORT THIS PAST WEEK. AND THIS TIME, SURPRISE, HE GOES TO A
20 VERY BIG NUMBER, BUT IT'S ON THE COPYRIGHT SIDE.

21 **THE COURT:** WHAT IS HIS VERY BIG NUMBER?

22 **MR. BABER:** IT'S UNCLEARLY EXACTLY, YOUR HONOR. BUT
23 HE'S CLAIMING, FOR EXAMPLE, THAT ALL OF GOOGLE'S REVENUE FROM
24 ADVERTISING ON MOBILE DEVICES CAN BE CAPTURED BY ORACLE AS AN
25 AWARD OF PROFITS UNDER THE COPYRIGHT ACT.

1 AND THOSE ARE NUMBERS IN THE VERY HIGH HUNDREDS OF
2 MILLIONS AND BEYOND, BUT HE MAKES NO ATTEMPT, NONE WHATSOEVER,
3 TO SHOW WHAT, IF ANY, PART OF THOSE PROFITS ARE ATTRIBUTABLE TO
4 THE COPYRIGHT ISSUES, THESE API'S.

5 THERE'S NO PASSIVE CAUSATION TO SAY THAT:

6 "WELL, THEY USED THIS PART OF OUR COPYRIGHTED
7 WORK, SO PUT ASIDE THE VIRTUAL MACHINE, PUT ASIDE
8 THE COMPILER, PUT ASIDE THE DEVELOPER KIT. WE
9 BELIEVE THIS PART IS ATTRIBUTABLE TO THE COPYRIGHT
10 INFRINGEMENT."

11 AND YOUR HONOR WILL HEAR ABOUT THAT IN DUE TIME. BUT
12 WE HAVE TWO ISSUES LIKE THAT. WE HAVE THIS MINUSCULE AMOUNT OF
13 LITERAL CODE COPYING TRYING TO WAG -- THAT TAIL IS TRYING --
14 THAT IS TRYING TO BE THE MAIN PIECE OF THE COPYRIGHT CLAIM --

15 **THE COURT:** BUT WHEN YOU SAY TO THE OTHER SIDE:

16 "OKAY. WE MADE A MISTAKE. BUT AS SOON AS YOU
17 BROUGHT IT TO OUR ATTENTION WE FIXED IT. THAT CODE
18 IS NOW LONG GONE."

19 BY THE WAY, THAT WOULD HAVE BEEN A NICE THING FOR MR.
20 JACOBS TO POINT OUT THAT THIS WAS LONG GONE. I DIDN'T REALIZE
21 THAT IT WAS LONG GONE. WHAT DO THEY SAY IN TERMS OF HOW THEY
22 HAVE BEEN DAMAGED?

23 **MR. BABER:** YOUR HONOR, THEY SAY THEY HAVE BEEN
24 DAMAGED. THEY SAY THAT THIS -- THEY HIGHLIGHT THIS LITERAL
25 COPYING. WE HAVE THESE EIGHT FILES. WE HAVE SOME COMMENTS IN

1 TWO OTHER FILES WHICH WE ALSO TOOK OUT RIGHT AWAY.

2 AND THEN, THERE'S THE NINE LINES OF CODE THAT MR.
3 SWOOPES JUST SHOWED YOU WITH SO CALLED "RANGE CHECK FUNCTION."

4 THAT'S STILL IN THERE. IT'S NINE LINES OUT OF
5 11 MILLION. AND IT IS A VERY SIMPLE CODE THAT SIMPLY DOES SOME
6 SANITY CHECKS ON SORTING THINGS.

7 THAT'S WHAT THEY ARE COPYING. AND THEY USE THAT, OF
8 COURSE, IN AN INFLAMMATORY WAY TO SAY:

9 "THIS SHOWS COPYING," WHEN, IN FACT, YOUR HONOR,
10 IT IS SO DE MINIMUS. IT'S LESS THAN ONE TENTH OF 1 PERCENT.

11 **THE COURT:** WHY WOULDN'T YOU BE THRILLED TO HAVE THEM
12 WASTE THEIR TIME AT TRIAL ON THIS SO THAT THE PATENT ISSUES FALL
13 TO ONE SIDE?

14 **MR. BABER:** YOUR HONOR, WE WOULD BE MORE THAN
15 DELIGHTED.

16 **THE COURT:** WHY DON'T YOU JUST LET THEM TAKE UP ALL
17 THEIR TIME ON COPYRIGHT, AND THEN YOU GET UP AND SAY:

18 "THIS WAS FIXED YEARS AGO."

19 **MR. BABER:** YOUR HONOR, WE WOULD BE MORE THAN
20 DELIGHTED IF THEY DID THAT.

21 **THE COURT:** WHY DIDN'T YOU WITHDRAW YOUR MOTION?

22 **MR. BABER:** BECAUSE OF THE API'S. THE API'S ARE
23 REALLY WHAT THIS ISSUE IS ABOUT. AND YOUR HONOR HIT THE NAIL ON
24 THE HEAD.

25 **THE COURT:** I THOUGHT THAT'S WHAT WE WERE TALKING

1 ABOUT.

2 **MR. BABER:** BUT NO, NO. THERE'S TWO DIFFERENT PARTS
3 TO THE COPYRIGHT CLAIM.

4 **THE COURT:** THE API'S YOU'RE STILL USING.

5 **MR. BABER:** ABSOLUTELY. WE'RE STILL USING THOSE 37
6 PACKAGES OF API'S. NO DOUBT ABOUT IT.

7 **THE COURT:** OKAY.

8 **MR. BABER:** BUT IT'S ALL ABOUT THE LANGUAGE.

9 **THE COURT:** WHAT DO YOU MEAN?

10 **MR. BABER:** THESE API'S, THE ONLY REASON THEY ARE IN
11 ANDROID, THE ONLY REASON IS TO FACILITATE USE OF THE JAVA
12 LANGUAGE BY PROGRAMMERS SO THAT PROGRAMMERS CAN USE THE SAME
13 ABBREVIATIONS, THE SAME METHOD SIGNATURES, THE SAME PARTS IN
14 THEIR CODE THAT THEY HAVE ALWAYS USED TO SAY:

15 "GO GET SOME CODE THAT WILL DO THIS FOR ME."

16 **THE COURT:** OKAY. LET ME ASK YOU A QUESTION NOW,
17 THEN, ON THAT FOR ME. LET'S SAY THAT -- LET'S TAKE IT OUT OF
18 THIS CONTEXT FOR A MINUTE.

19 LET'S SAY THERE'S A COMPLETELY DIFFERENT HYPOTHETICAL
20 COMPANY THAT COMES ALONG AND WANTS TO USE THE JAVA API'S, JUST
21 THE JAVA API'S. AND DO THEY NEED A LICENSE TO DO THAT?

22 **MR. BABER:** YOUR HONOR, WE DON'T BELIEVE THEY DO,
23 BECAUSE THE API'S -- AND, AGAIN, WITH PRECISION, BECAUSE WE HAVE
24 TO BE TALKING IN COPYRIGHT ABOUT THINGS THAT ARE FIXED. THE
25 IDEAS OF THE API'S, THE CONCEPT OF THE INTERFACE, NO. THEY CAN'T

1 PROTECT THAT. NO ONE CAN PROTECT THAT UNDER COPYRIGHT.

2 **THE COURT:** WHY NOT? WHY NOT? LET'S SAY I HAVE AN
3 API THAT WILL FIND HOW TO ADD TWO NUMBERS TOGETHER. THERE WOULD
4 BE MANY WAYS TO DO THAT.

5 **MR. BABER:** THERE ARE, YOUR HONOR.

6 **THE COURT:** SO WHY, IF THEY COME UP WITH A PARTICULAR
7 WAY TO DO IT THAT IS SO ELEGANT A SOLUTION IT SAVES TIME AND THE
8 OTHER WAYS TO DO IT TAKE TWICE AS LONG, COMPUTER TIME-WISE, WHY
9 CAN'T THEY GET A COPYRIGHT ON THEIR WAY TO DO IT?

10 **MR. BABER:** BECAUSE, YOUR HONOR, THAT'S EXACTLY WHAT
11 COPYRIGHT IS ALL ABOUT IN THIS SCENARIO. COPYRIGHT LAW ALLOWS
12 OTHER PARTIES TO COPY ELEMENTS OF API'S, OR OF ANYTHING ELSE,
13 FOR THAT MATTER, THAT ARE FUNCTIONAL REQUIREMENTS FOR
14 COMPATIBILITY.

15 THAT IS THE HOLDING OF THE SEGA CASE. THAT'S WHAT
16 THE COURT SAID IN THE SONY CASE. THAT IS NOT COPYRIGHTABLE.

17 **THE COURT:** BUT UNDER YOUR DEFINITION EVERY SINGLE
18 API WOULD BE A FUNCTION, FUNCTIONAL. NOTHING WOULD BE
19 COPYRIGHTABLE UNDER YOUR VIEW.

20 **MR. BABER:** NO, YOUR HONOR. WHAT IS COPYRIGHTABLE,
21 WHAT IS CLEARLY COPYRIGHTABLE -- WE DON'T DISPUTE -- IS ALL THAT
22 CODE IN ALL THOSE LIBRARIES THAT PERFORM THESE FUNCTIONS. BUT
23 WHAT ORACLE IS SAYING --

24 **THE COURT:** WAIT, THAT IS OR IS NOT?

25 **MR. BABER:** IT IS COPYRIGHTABLE, BUT OURS IS

1 DIFFERENT. THAT'S THE POINT. THERE'S HUNDREDS OF THOUSANDS OF
2 LINES OF CODE THAT IMPLEMENT THESE API'S. THEY ACTUALLY TELL THE
3 COMPUTER:

4 "HERE'S HOW YOU CALCULATE THE SQUARE ROOT."
5 THOSE ARE DIFFERENT. YOU HAVE HEARD NOTHING FROM THEM, AND YOU
6 WON'T HEAR ANYTHING FROM THEM ABOUT LITERAL COPYING OF ANY OF
7 THAT CODE.

8 **THE COURT:** OKAY. WAIT A SECOND. SO ARE YOU SAYING
9 THAT YOU HAVE YOUR OWN API'S? THAT YOU WROTE YOUR OWN API'S?

10 **MR. BABER:** WE HAVE OUR OWN IMPLEMENTATION OF THE
11 API'S.

12 **THE COURT:** JUST STICK WITH THE SQUARE ROOT THING FOR
13 A SECOND.

14 **MR. BABER:** ALL RIGHT.

15 **THE COURT:** ALL RIGHT. SO JAVA'S GOT ONE. IF I
16 LOOKED AT THE JAVA ONE LIKE THIS, IT WOULD HAVE A CERTAIN SET OF
17 CODE, RIGHT?

18 **MR. BABER:** CORRECT.

19 **THE COURT:** THEN, YOU HAVE YOUR OWN API THAT DOES THE
20 SQUARE ROOT. AND YOU ARE TELLING ME IT'S DIFFERENT CODE.

21 **MR. BABER:** WHAT IT WILL HAVE, YOUR HONOR -- AND THIS
22 IS IN PROFESSOR ASTRACHAN'S REPORT AND ALSO IN OUR BRIEF -- IF
23 YOU PUT THEM SIDE-BY-SIDE YOU WOULD SEE THE ELEMENTS THAT YOU
24 NEED TO IDENTIFY WHAT IS THE API YOU ARE IMPLEMENTING. AND
25 SQUARE ROOT IS A GOOD EXAMPLE.

1 SQUARE ROOT HAS BEEN OUT THERE IN THE JAVA LANGUAGE
2 FOR MANY YEARS. IF YOU'RE WRITING A PROGRAM AND YOU WANT
3 SOMETHING TO CALCULATE A SQUARE ROOT FOR YOU, YOU PUT IN YOUR
4 CODE: Sqrt," AND IN PARENTHESES THE NUMBER YOU WANT THE SQUARE
5 ROOT OF.

6 SO LET'S SAY YOU WANT THE SQUARE ROOT OF 25:

7 "Sqrt (25)."

8 IT THEN GOES OFF TO THE LIBRARY. THE LIBRARY SAYS:

9 "AH, I HAVE AN INCOMING REQUEST TO CALCULATE
10 SQUARE ROOT."

11 I KNOW THAT BECAUSE IT USED THE PHRASE "Sqrt PAREN."

12 IT CALCULATES IT, AND IT SENDS BACK THE NUMBER FIVE.
13 THAT'S HOW THE API WORKS.

14 WHAT THEY ARE SAYING IS WE CAN'T USE Sqrt PAREN. THAT
15 ANYBODY WHO IS WRITING CODE HAS TO NOW LEARN SOME OTHER NAME TO
16 GO GET A SQUARE ROOT.

17 **THE COURT:** ALL RIGHT. ALL RIGHT. OKAY. YOU'RE
18 SAYING -- YOU'RE BEING CLEAR, BUT LET ME BE EVEN ASKING FOR A
19 CLARIFICATION.

20 YOU'RE SAYING THAT ON YOUR -- YOU ADMIT YOU USE
21 Sqrt --

22 **MR. BABER:** ABSOLUTELY.

23 **THE COURT:** -- PARENTHESES, WHATEVER. ALL RIGHT.

24 BUT YOU'RE SAYING THAT WHEN YOU CALL UP THAT FUNCTION
25 THROUGH YOUR API, YOU HAVE DIFFERENT SEQUENCES OF STEPS THAN

1 WOULD OCCUR UNDER THE JAVA API.

2 **MR. BABER:** ABSOLUTELY CORRECT, YOUR HONOR. THE CODE
3 IS DIFFERENT.

4 **THE COURT:** ALL RIGHT. SO --

5 **MR. BABER:** THE ONLY PARTS THAT ARE THE SAME ARE THE
6 ELEMENTS THAT DEFINE THE API.

7 **THE COURT:** OKAY.

8 **MR. BABER:** WHAT DO YOU CALL IT? WHAT DO YOU SEND TO
9 IT? AND WHAT DOES IT SEND BACK TO YOU, ET CETERA.

10 **THE COURT:** ALL RIGHT. SO YOU'RE SAYING THAT --
11 WELL, ALL RIGHT. BUT THEN ORACLE WOULD ASK YOU THIS QUESTION.
12 THEY WOULD SAY:

13 "WELL, INSTEAD OF SAYING 'SQRT,' WHY DIDN'T YOU
14 SAY 'SQT' OR 'SQR'?"

15 **MR. BABER:** BECAUSE, YOUR HONOR --

16 **THE COURT:** WHY DIDN'T YOU JUST COME UP WITH YOUR OWN
17 NAME, YOU KNOW, SHORTHAND NAME? WHY ARE YOU PIGGYBACKING ON
18 THEIR NAME?

19 **MR. BABER:** FOR TWO REASONS, YOUR HONOR. FIRST OF
20 ALL, WE'RE ENTITLED TO AS A MATTER OF LAW. UNDER THE NINTH
21 CIRCUIT COPYRIGHT LAW, FIRST CIRCUIT COPYRIGHT LAW, IT'S THE LAW
22 OF VIRTUALLY ALL OF THE CIRCUITS.

23 **THE COURT:** WHAT IS THAT LAW?

24 **MR. BABER:** THE LAW, YOUR HONOR, IS SEGA AND SONY.

25 **THE COURT:** WHAT DOES IT SAY? WHY -- IT'S NOT

1 INHERENTLY CLEAR TO ME WHY THAT WOULD BE THE LAW. WHAT IS THE
2 LAW THERE?

3 **MR. BABER:** THE LAW IS, AND THE PHRASE FROM SEGA IS:
4 "FUNCTIONAL REQUIREMENTS FOR COMPATIBILITY ARE
5 NOT COPYRIGHTABLE."

6 **THE COURT:** WHY DOES IT HAVE -- WHAT DO YOU MEAN
7 "COMPATABILITY," BECAUSE YOU HAVE GOT A DIFFERENT CODE. YOU'VE
8 GOT AT DIFFERENT API, YOU'RE TELLING ME. IT DOES THE SAME
9 FUNCTION.

10 THEY ARE NOT -- ORACLE IS NOT GOING SO FAR AS TO SAY
11 THAT YOU CAN'T COME UP WITH YOUR OWN API TO DO A SQUARE ROOT,
12 ARE THEY? AM I RIGHT ABOUT THAT? WHAT THEY ARE SAYING IS:

13 "YOU CAN'T USE OUR ABBREVIATIONS."

14 **MR. BABER:** THAT'S WHAT THEY ARE SAYING, BASICALLY,
15 IS:

16 "YOU CAN'T USE THE SAME NAMES. YOU CAN'T CALL
17 THEM THE SAME THING."

18 BUT WHAT NOT ONLY THE NINTH CIRCUIT CASES BUT CLEARLY
19 LOTUS SAYS AND WHAT COPYRIGHT IS ALL ABOUT IS IF YOU HAVE
20 TECHNICAL FUNCTIONAL REQUIREMENTS IN THE SOFTWARE FIELD FOR
21 COMPATABILITY -- AND I WANT TO BE CLEAR WHAT WE'RE TALKING ABOUT
22 IS COMPATIBILITY.

23 IF I'M A PROGRAMMER, AND I HAVE CODE I HAVE WRITTEN
24 IN THE PAST IN THE JAVA LANGUAGE, AND IT USES THESE API'S. IT
25 PUTS THOSE LITTLE MAGIC PHRASES IN THERE AND SAYS:

1 "GO DO THIS FOR ME. GO DO THAT FOR ME. GO DO
2 THIS." IN ORDER FOR THAT CODE TO BE REUSED IN
3 ANDROID THESE SAME API'S HAVE TO BE SUPPORTED, OTHERWISE THE
4 CODE WOULD HAVE TO BE REWRITTEN. IF THE API'S WEREN'T ORGANIZED
5 THE SAME IT WOULDN'T EXECUTE --

6 **THE COURT:** BASICALLY YOU'RE SAYING THAT THESE
7 SHORTHAND WORDS HAVE BECOME INGRAINED INTO THE ART AND SCIENCE
8 OF JAVA PROGRAM AS RECOGNIZABLE WORDS THAT THE MACHINE LANGUAGE
9 WOULD RECOGNIZE UNDER JAVA. SO, IN OTHER WORDS, WHATEVER WOULD
10 BE A PROGRAMMING LANGUAGE, YOU'RE SAYING IT'S PART OF THE
11 PROGRAMMING LANGUAGE.

12 **MR. BABER:** AND, YOUR HONOR --

13 **THE COURT:** IS THAT WHAT YOU'RE SAYING?

14 **MR. BABER:** THAT IS ABSOLUTELY WHAT WE'RE SAYING,
15 YOUR HONOR. AND IF YOU READ THEIR EXPERT'S -- THEIR EXPERT'S
16 OPINION, HE SAYS THAT AT LEAST SOME OF THESE API'S ARE, QUOTE:

17 "TIED CLOSELY TO THE JAVA LANGUAGE," UNQUOTE,
18 AND ARE, QUOTE "FUNCTIONALLY NECESSARY IN ORDER TO
19 USE THE LANGUAGE."

20 THAT'S PROFESSOR MITCHELL'S REBUTTAL REPORT. HE SAYS
21 IT THREE TIMES: PARAGRAPH 20, PARAGRAPH 57, PARAGRAPH 70.

22 HE SAYS SOME OF THEM YOU HAVE TO HAVE THESE TO WRITE
23 IN THE JAVA LANGUAGE. OTHERS YOU DON'T HAVE TO HAVE THEM, BUT
24 THEY CERTAINLY FACILITATE THE USE OF THE LANGUAGE.

25 THEIR OWN MATERIALS ON THE WEBSITE IDENTIFY THESE AS

1 CORE API'S FOR THE LANGUAGE THAT ARE, QUOTE:

2 "FUNDAMENTAL TO THE DESIGN OF THE JAVA
3 PROGRAMMING LANGUAGE."

4 AND WHAT IS GOING ON HERE, YOUR HONOR, WITH THIS
5 COPYRIGHT CLAIM IS ORACLE IS SAYING:

6 "OH, YEAH. WE HAVE SAID THEY CAN USE THE
7 LANGUAGE, BUT THEY CAN ONLY USE SOME OF THE
8 VOCABULARY. THEY CAN ONLY USE SOME OF THE WORDS IN
9 THE JAVA DICTIONARY, IN EFFECT."

10 **THE COURT:** SO YOU'RE SAYING THAT WHAT MR. JACOBS IS
11 DOING IS SAYING:

12 "YES, IT'S OKAY TO USE THE PROGRAMMING LANGUAGE,
13 BUT ONLY SOME OF IT. YOU CAN'T USE THE WORDS THAT WE
14 PARTICULARLY WANT TO HOLD BACK."

15 **MR. BABER:** WELL, AND --

16 **THE COURT:** IS THAT IT?

17 **MR. BABER:** THAT'S ACCURATE IN THE SENSE WHEN YOU
18 THINK OF THESE, WHAT WE CALL "THE METHOD SIGNATURES" FOR THESE
19 API'S. IN OTHER WORDS, AS A PROGRAMMER IS WRITING HIS CODE AND
20 WANTS TO USE ONE OF THESE PIECES OF PREWRITTEN CODE, HE'S GOT TO
21 PUT THE RIGHT PHRASE IN HIS PROGRAM. WHETHER IT'S SQRT FOR
22 SQUARE ROOT, ABS FOR ABSOLUTE VALUE. EVERYONE HAS A LITTLE --
23 IT'S LIKE A LITTLE SPECIAL VOCABULARY.

24 AND WHEN YOU LOOK AT THE EXHIBITS LIKE HE SHOWED YOU,
25 AND YOU LINE THEM UP, WELL, OF COURSE THEY ARE THE SAME. WE'RE

1 IMPLEMENTING THE SAME API'S. IT'S JUST LIKE TWO DICTIONARIES
2 FOR THE SAME LANGUAGE.

3 **THE COURT:** YOU'RE SAYING THE API'S -- IT'S NOT THE
4 API'S. IT'S THE -- WHAT ARE THOSE WORDS CALLED AGAIN?

5 **MR. BABER:** THE METHOD SIGNATURES?

6 **THE COURT:** NO, THE WORDS LIKE SQRT.

7 **MR. BABER:** THAT'S A METHOD SIGNATURE, YOUR HONOR.

8 **THE COURT:** YOU ARE SAYING THE METHOD SIGNATURES ARE
9 EQUAL TO AND PART OF THE JAVA PROGRAMMING LANGUAGE WHICH IS OPEN
10 TO ANYONE.

11 **MR. BABER:** THAT IS CORRECT, YOUR HONOR. THEY ARE AS
12 A PRACTICAL MATTER. SOME OF THEM, THEIR EXPERT SAYS, ARE
13 REQUIRED. OTHERS ARE THERE, BUT SIMPLY FACILITATE AND ENABLE
14 USE.

15 **THE COURT:** READ TO ME WHAT THEIR OWN EXPERTS SAY ON
16 THIS SUBJECT.

17 **MR. BABER:** PROFESSOR MITCHELL IN HIS REPLY OR HIS
18 REBUTTAL REPORT, RATHER, SAID THAT AT LEAST SOME OF THESE API'S
19 AND SOME OF THE BASIC CLASSES CALLED JAVA.LANG, JAVA.UTIL, ET
20 CETERA, ARE, QUOTE: "TIED CLOSELY TO THE JAVA LANGUAGE,"
21 UNQUOTE AND ARE, QUOTE, "FUNCTIONALLY NECESSARY," UNQUOTE, IN
22 ORDER TO MAKE USE OF THE JAVA LANGUAGE.

23 **THE COURT:** WHICH ONES DID HE CALL OUT AS BEING IN
24 THAT CATEGORY?

25 **MR. BABER:** HE CALLED OUT -- HE CALLED OUT THREE OF

1 THE PACKAGES, IN PARTICULAR, AND SAID:

2 "WELL, THERE'S SOME PARTS OF THOSE, AT LEAST."

3 **THE COURT:** THEN THERE WILL BE 34 LEFT, THOUGH.

4 **MR. BABER:** WELL, YOUR HONOR --

5 **THE COURT:** WHAT DO YOU SAY TO THE OTHER 34?

6 **MR. BABER:** AS TO THE OTHER 34, YOUR HONOR, THEY MAY
7 NOT BE TECHNICALLY NECESSARY, TO USE THE LANGUAGE, BUT THEY ARE
8 THERE IN ORDER TO FACILITATE USE OF THE LANGUAGE, TO BE
9 INTEROPERABLE, AND THAT'S WHAT THE NINTH CIRCUIT LAW SAYS WE CAN
10 DO.

11 WE CAN USE THOSE FUNCTIONAL ELEMENTS IN ORDER TO
12 FACILITATE THE USE OF THE LANGUAGE, IN ORDER THAT PROGRAMMERS
13 DON'T HAVE TO LEARN NEW ABBREVIATIONS. THAT'S INEFFICIENT.
14 IT'S TIME-CONSUMING, AND COPYRIGHT DOESN'T REQUIRE THAT.
15 COPYRIGHT ALLOWS --

16 **THE COURT:** IT'S ALL TRUE, BUT THEY CAME UP WITH
17 THESE WORDS AND THEY WERE NOT PART -- THEY WEREN'T ORIGINALLY
18 PART OF THE PROGRAMMING LANGUAGE. THEY JUST INVENTED THOSE
19 ABBREVIATIONS, AND NOW YOU WANT TO PIGGYBACK ON THAT.

20 **MR. BABER:** WELL, YOUR HONOR, MR. JACOBS' ARGUMENT
21 ABOUT HOW CREATIVE ALL OF THIS WAS, ET CETERA, IS, FRANKLY, A
22 RED HERRING. BECAUSE COPYRIGHT LAW TELLS US YOU MAY HAVE THE
23 MOST CREATIVE IDEA IN THE WORLD, THE MOST CREATIVE THING
24 SOMEBODY HAS EVER COME UP WITH, BUT AS LONG AS IT'S STILL AN
25 IDEA, IT'S NOT PROTECTABLE.

1 YOU MAY COME UP WITH A REALLY CREATIVE SHORT WORD
2 PHRASE, BUT NO MATTER HOW CREATIVE IT IS IT'S NOT PROTECTABLE.

3 THERE ARE CERTAIN BOUNDS OF COPYRIGHT LAW. HIS
4 ARGUMENT IS DESIGNED TO SAY: WELL, WHEN THEY CREATED THESE
5 API'S AND CAME UP WITH THEM IN THE FIRST PLACE THEY HAD LOTS OF
6 CHOICES. THEY DID. THAT'S NOT THE ISSUE.

7 THE ISSUE IS: NOW THAT THEY HAVE BECOME
8 WELL-ESTABLISHED AMONG THE 6 OR 8 MILLION JAVA PROGRAMMERS OUT
9 THERE WHO ALL KNOW HOW TO USE THESE, WHO RELY ON THEM IN THEIR
10 PROGRAMMING ALL THE TIME, THEY HAVE BECOME, IN EFFECT, INDUSTRY
11 STANDARDS.

12 **THE COURT:** NOW, DON'T GIVE ME FIVE CASES. JUST GIVE
13 ME ONE DECISION AND READ TO ME THE CRITICAL TWO OR THREE
14 SENTENCES FROM THAT ONE DECISION THAT IS CLOSEST ON POINT TO
15 THIS ARGUMENT YOU'RE MAKING SO THAT I CAN QUIZ YOU ABOUT THAT.

16 **MR. BABER:** ALL RIGHT, YOUR HONOR.

17 **THE COURT:** I DON'T WANT THREE DECISIONS. I DON'T
18 WANT TWO. I DON'T WANT THE FIRST CIRCUIT. I WANT NINTH CIRCUIT
19 AND THREE SENTENCES.

20 **MR. BABER:** I THINK I'M GOING TO ONLY GIVE YOU TWO,
21 BECAUSE I THINK TWO WILL DO. YOUR HONOR, THIS IS FROM SEGA
22 VERSUS ACCOLADE. IN SEGA VERSUS ACCOLADE, THE NINTH CIRCUIT
23 SAID --

24 **THE COURT:** SLOWLY.

25 **MR. BABER:** -- QUOTE:

1 "THE FUNCTIONAL REQUIREMENTS FOR COMPATIBILITY
2 WITH THE GENESIS CONSOLE WERE ASPECTS OF SEGA'S
3 PROGRAMS THAT ARE NOT PROTECTED BY COPYRIGHT."
4 AND THEY CITED 17 USC 102 (B).

5 THAT'S THE STATUTORY SECTION I REFERENCED EARLIER
6 WHICH SAYS --

7 **THE COURT:** BUT WHEN YOU WROTE YOUR OWN 37 PROGRAMS
8 YOU YOURSELF SAY IT'S DIFFERENT CODE LANGUAGE, RIGHT?

9 **MR. BABER:** CORRECT.

10 **THE COURT:** YOU COULD HAVE -- YOU COULD HAVE INVENTED
11 YOUR OWN ABBREVIATIONS. INSTEAD OF SQRT, YOU COULD HAVE SAID
12 SQR -- SQR.

13 **MR. BABER:** WE COULD HAVE.

14 **THE COURT:** AND YOU COULD HAVE DONE IT THAT WAY AND
15 HAD YOUR OWN SET SO THAT IT WOULDN'T BE ESSENTIAL TO BE
16 COMPATIBLE WITH YOUR OWN ANDROID SYSTEM. YOU COULD HAVE WRITTEN
17 IT THAT WAY IF YOU HAD WANTED TO HAVE IT WRITTEN THAT WAY.

18 **MR. BABER:** YOU COULD HAVE. BUT IF WE WANTED TO BE
19 COMPATIBLE AND TO ALLOW PROGRAMMERS TO USE THE TOOLS AND
20 KNOWLEDGE THEY ALREADY HAD, WHICH COPYRIGHT LAW ALLOWS US TO DO,
21 WE ALSO HAD THE RIGHT TO USE THE SAME ABBREVIATIONS.

22 TWO FURTHER QUOTES, YOUR HONOR, FROM THE SAME SEGA
23 CASE.

24 **THE COURT:** ALL RIGHT.

25 **MR. BABER:** OKAY. THE SECOND QUOTE IS WHERE THE SEGA

1 COURT SAYS:

2 "THE PROTECTION" -- THIS IS AT PAGE 1524:

3 "THE PROTECTION ESTABLISHED BY THE COPYRIGHT ACT
4 FOR ORIGINAL WORKS OF AUTHORSHIP DOES NOT EXTEND TO
5 THE IDEAS UNDERLYING A WORK OR THE FUNCTIONAL OR
6 FACTUAL ASPECTS OF A WORK. TO THE EXTENT A WORK IS
7 FUNCTIONAL OR FACTUAL IT MAY BE COPIED AS MAY BE
8 THOSE EXPRESSIVE ELEMENTS OF THE WORK THAT, QUOTE,
9 'MUST NECESSARILY BE USED AS INCIDENT TO EXPRESSION
10 OF THE UNDERLYING IDEAS, FUNCTIONAL CONCEPTS OR
11 FACTS."

12 THAT'S IN THE LEFT SIDE COLUMN. ON THE SAME PAGE,
13 1524, ON THE RIGHT, THE COURT SAID:

14 "COMPUTER PROGRAMS ARE, IN ESSENCE, UTILITARIAN
15 ARTICLES, ARTICLES THAT ACCOMPLISH TASKS. AS SUCH
16 THEY CONTAIN MANY LOGICAL STRUCTURE VISUAL DISPLAY
17 ELEMENTS THAT ARE DICTATED BY THE FUNCTION TO BE
18 PERFORMED, BY CONSIDERATIONS OF EFFICIENCY OR BY
19 EXTERNAL FACTORS SUCH AS COMPATIBILITY REQUIREMENTS
20 AND INDUSTRY DEMANDS. IN SOME CIRCUMSTANCES EVEN THE
21 EXACT SET OF COMMANDS USED BY THE PROGRAMMER IS
22 DEEMED FUNCTIONAL RATHER THAN CREATIVE FOR PURPOSES
23 OF COPYRIGHT."

24 AND THEN, IT CITES FROM THE CONTOUR REPORT WHICH IS
25 CONGRESSIONAL.

1 **THE COURT:** I WANT TO GIVE MR. JACOBS A CHANCE TO
2 RESPOND HERE. BUT SO LET ME ASK YOU TO HAVE A SEAT.

3 MR. JACOBS, I HAVE THIS QUESTION FOR YOU. FIRST, DO
4 YOU AGREE THAT THEY WENT AND CHANGED ALL THOSE, THE ONES LIKE WE
5 HAVE ON THE SCREEN WHERE IT WAS THE SAME CODE?

6 **MR. JACOBS:** NO, YOUR HONOR.

7 **THE COURT:** YOU'RE SAYING THEY STILL GOT --

8 **MR. JACOBS:** THERE ARE TWO CATEGORIES THAT ARE THESE
9 SO-CALLED TEST PROGRAMS THAT GOOGLE'S COUNSEL WAS ALLUDING TO.
10 THEY HAVE REPRESENTED THAT THEY REMOVED THEM. WE HAVE NOT FOR
11 THE PURPOSES OF THE MOTION ADDRESSED THAT ISSUE BECAUSE THERE
12 ARE THOUSANDS OF COPIES OF IT OUT IN THE WORLD FOR WHICH THEY
13 ARE RESPONSIBLE.

14 AND THEN, THERE'S ANOTHER CATEGORY, THE TIMSORT CASE
15 THAT YOU -- THAT YOU SAW WHEN MR. SWOOPES WAS HERE. AND I DON'T
16 THINK THEY HAVE MADE A REPRESENTATION THAT THAT'S BEEN REMOVED,
17 AND I DON'T BELIEVE WE'VE DETECTED ANY REMOVAL. SO THAT REMAINS
18 AS FAR AS WE ALL KNOW.

19 IT'S THE STATE OF THE RECORD ON THAT IS IT'S STILL IN
20 THE CODE.

21 **THE COURT:** ALL RIGHT. WELL, LET'S KEEP THAT POINT
22 OF CONFUSION TO ONE SIDE. LET'S JUST FOCUS ON THE 37 API'S.

23 **MR. JACOBS:** YES.

24 **THE COURT:** IS IT TRUE THAT THEY USE DIFFERENT CODE
25 NOW TO IMPLEMENT THEIR 37 API'S?

1 **MR. JACOBS:** LET ME SHOW YOU WHAT WE ARE TALKING
2 ABOUT.

3 SO THIS IS -- I'M ON SLIDE 18 OF OUR SLIDE DECK. AND
4 IF I'VE GOT THIS RIGHT, ON THE LEFT WE HAVE THE JAVA API
5 SPECIFICATION. SO THIS IS PROTECTION DOMAIN, CODE SOURCE, CODE
6 SOURCE, PERMISSION COLLECTION, PERMISSIONS.

7 THAT'S THE DEFINITION OF THIS PARTICULAR CONSTRUCTOR.
8 CONSTRUCTOR ITSELF IS A JAVA ARTIFACT.

9 AND THEN, IF YOU LOOK AT THE ANDROID SOURCE CODE THAT
10 IMPLEMENTS IT OVER ON THE RIGHT, YOU CAN SEE THE DECLARATION OF
11 THIS CONSTRUCTOR PUBLIC IS A JAVA LANGUAGE COMMAND TO DECLARE
12 SOMETHING AS AVAILABLE, IN EFFECT, TO THE PROGRAMMING OUTSIDE
13 WORLD.

14 AND THEN YOU'LL SEE EACH OF THE -- EACH OF THE
15 ELEMENTS FROM THE API REPRODUCED IN THE SOURCE CODE. THEN, THIS
16 CODE ITSELF IS AN IMPLEMENTATION AND COMMENTS OF THIS
17 APPLICATION PROGRAMMING INTERFACE.

18 SO I THINK WE AGREE AND DISAGREE WITH GOOGLE'S
19 COUNSEL. BUT LEAVING ASIDE OUR EXAMPLES OF CODE COPYING, OUR
20 ALLEGATION IN THE CASE IS NOT THAT ANDROID DID NOT -- COUPLE OF
21 DOUBLE NEGATIVES THERE.

22 WE ARE NOT CLAIMING THAT THIS CODE IS NOT AN -- THAT
23 THIS CODE IS NOT AN INDEPENDENT IMPLEMENTATION.

24 WE ARE CLAIMING THAT THIS IS DERIVED FROM THIS
25 (INDICATING). THAT THIS CODE, THE ANDROID SOURCE CODE,

1 IMPLEMENTING THE COPYRIGHTED API'S IS A DERIVATIVE WORK, MUCH AS
2 TO CHANGE THE LITERAL ANALOGY A LITTLE BIT, IF YOU HAD A NOVEL
3 OVER ON THE LEFT THAT SAID HERE'S WHAT WE'RE GOING TO DO IN THE
4 STORY, AND THEN YOU CREATE A MOVIE OVER ON THE RIGHT, THE MOVIE
5 OVER ON THE RIGHT WOULD BE DERIVED FROM THE NOVEL ON THE LEFT.

6 OR IT CAN BE A LITTLE MORE FACTS-BASED. AND TO STICK
7 WITH YOUR HISTORIANS CASE, IF A HISTORIAN WROTE THE NARRATIVE
8 HISTORY OF THE TRANSCONTINENTAL RAILWAY, AND A MOVIE WAS BASED
9 CLOSELY ON THAT PARTICULAR HISTORICAL NARRATIVE, THAT MOVIE
10 WOULD BE A DERIVATIVE OF THE COPYRIGHTED HISTORY.

11 LET ME UNDERLINE THIS POINT A LITTLE BIT. AND IN A
12 WAY I WANT TO -- I WANT YOUR HONOR TO BE REALLY CLEAR ABOUT WHAT
13 THE DISPUTE IS, SO I'M GOING TO SLIGHTLY ECHO MR. BABER'S
14 ARGUMENT.

15 CAN I HAVE THE ELMO?

16 AND SO YOU CAN SEE A LITTLE BIT IN A LITTLE BIT
17 GREATER DETAIL WHAT IS AT STAKE HERE.

18 **THE COURT:** I CAN'T READ IT. THAT'S NOT IN FOCUS.
19 THANK YOU.

20 **MR. JACOBS:** I'M GOING TO FOCUS IT.

21 **THE COURT:** THERE YOU GO.

22 **MR. JACOBS:** THERE WE GO. THIS IS THE COPYRIGHT
23 LEGEND AND LICENSE ON THE API SPECIFICATION. THIS IS EXHIBIT 22
24 TO THE SWOOPES DECLARATION. AND WHAT YOU'LL SEE HERE IS THE WAY
25 SUN-NOW-ORACLE IS RELYING ON COPYRIGHT TO PROTECT THE

1 COMPATIBILITY, THE NONFRAGMENTATION OF THE JAVA PLATFORM.

2 SO WHAT THE LICENSE GRANT IN THE API SPECIFICATION IS
3 IS:

4 "A FULLY PAID," ET CETERA, "LICENSE UNDER SUN'S
5 INTELLECTUAL PROPERTY RIGHTS THAT ARE ESSENTIAL TO
6 PRACTICE THIS SPECIFICATION. THIS LICENSE ALLOWS AND
7 IS LIMITED TO THE CREATION AND DISTRIBUTION OF CLEAN
8 ROOM IMPLEMENTATIONS OF THIS SPECIFICATION THAT
9 INCLUDE A COMPLETE IMPLEMENTATION OF THE CURRENT
10 VERSION OF THIS SPECIFICATION WITHOUT SUBSETTING,"
11 MEANING TAKING THINGS OUT, "OR SUPERSETTING," MEANING
12 ADDING THINGS IN, "IMPLEMENTS ALL THE INTERFACES AND
13 FUNCTIONALITY OF THE STANDARD JAVA PACKAGES AS
14 DEFINED BY SUN," AGAIN, WITHOUT SUBSETTING OR
15 SUPERSETTING, "DO NOT ADD ANY ADDITIONAL PACKAGES,
16 CLASSES OR METHODS TO THE JAVA PACKAGES, AND THEN
17 PASS THE TEST SUITES THAT ARE AVAILABLE FROM SUN, ARE
18 NOT DERIVED FROM THE SOURCE CODE," ET CETERA.

19 SO THIS IS THE -- COPYRIGHT IS THE ENFORCEMENT
20 MECHANISM HERE. COPYRIGHT PROTECTS THESE API SPECIFICATIONS FROM
21 WHAT GOOGLE DID. GOOGLE DID EXACTLY WHAT THIS LICENSE PROHIBITS.
22 GOOGLE SUBSETTING --

23 **THE COURT:** WELL, PERHAPS THEY DID, UNLESS -- BUT IF
24 THE LAW PERMITTED THEM TO DO THAT, IF IT'S NOT COPYRIGHTABLE IN
25 THE FIRST PLACE, OR THAT THERE WAS FAIR USE, OR, I MEAN, JUST

1 BECAUSE THAT'S WHAT YOU DEMAND IN YOUR COPYRIGHT LICENSES
2 DOESN'T MEAN THAT THE LAW BACKS THAT UP AS BEING REQUIRED.

3 **MR. JACOBS:** AND THAT WOULD MEAN THAT THE DISCLOSURE
4 IN THIS DOCUMENT IS NOT PROTECTED BY COPYRIGHT. THAT IT IS FREE
5 FOR GOOGLE TO TAKE AND JUST ALTER THE NARRATIVE SLIGHTLY IN
6 THEIR OWN DOCUMENTATION AND TO DERIVE AS COMPUTER PROGRAM FROM
7 IT.

8 AND THIS BRINGS ME TO SEGA, BECAUSE GOOGLE'S COUNSEL
9 LEFT OUT A CRITICAL PART OF THE FACTS OF SEGA WHEN HE READ YOU
10 THE RATIO DECIDENDI, OR THE DICTA. IN SEGA, AT FOOTNOTE SEVEN,
11 THE COURT SAYS:

12 "SEGA'S KEY, WHICH WAS THE ELEMENT REQUIRED FOR
13 COMPATIBILITY, SEGA'S KEY APPEARS TO BE FUNCTIONAL.

14 IT CONSISTS MERELY OF 20 BYTES OF INITIALIZATION CODE
15 PLUS THE LETTERS S-E-G-A."

16 THAT WAS THE UNPROTECTABLE ELEMENT IN SEGA V.
17 ACCOLADE. NOTHING LIKE THE ELABORATE APPLICATION PROGRAMMING
18 INTERFACE DEFINITION THAT IS AT ISSUE IN THIS LAWSUIT.

19 THE TAKEAWAY THAT I THINK IS THE ONLY FAIR TAKEAWAY
20 FROM READING THE ARRAY OF CASES IS THE FOLLOWING: ON THE ONE
21 HAND, THE WHELAN (PHONETIC) DECISION HAS NOT BEEN FOLLOWED
22 BROADLY OUT OF THE THIRD CIRCUIT. ON THE OTHER HAND, LOTUS V.
23 BORLAND HAS NOT BEEN FOLLOWED OUT OF THE FIRST CIRCUIT. THE
24 NINTH CIRCUIT AND REMAINING CIRCUITS SAY IT'S ALL A MATTER OF
25 CLOSE FACTUAL INQUIRY ABOUT WHAT WAS TAKEN, WHY IT WAS TAKEN,

1 HOW IT FITS INTO THE OVERALL PICTURE, AND MOST IMPORTANTLY --
2 AND THIS IS WHERE I END UP BACK AT THE VERY BEGINNING -- AS THIS
3 FOOTNOTE INDICATES THE LEVEL OF CREATIVITY THAT WENT INTO THE
4 CREATION OF THE API.

5 ARE WE MERELY TALKING ABOUT AS IN THE -- I THINK IT'S
6 THE BATEMAN CASE -- A TABLE WITH NUMBERS AND BAUD RANGES, OR ARE
7 WE TALKING ABOUT SOMETHING THAT, AS GOOGLE'S OWN PROGRAMMERS
8 ACKNOWLEDGE, REQUIRED A GREAT DEAL OF ARTISTRY AND CREATIVITY?

9 **THE COURT:** ALL RIGHT. I HAVE ONE LAST QUESTION FOR
10 THE MOVING PARTY, FOR GOOGLE. AND THAT IS: IS IT TRUE AND IS
11 MR. JACOB'S CORRECT THAT YOU DID NOT FIX -- SOME OF THE CODE IS
12 STILL IDENTICAL?

13 **MR. BABER:** THE ONE THAT HE'S REFERRING TO, YOUR
14 HONOR, AND I THINK I REFERRED TO EARLIER, WHICH IS THE NINE
15 LINES OF CODE, THE SO-CALLED RANGE CHECK FUNCTION WHICH IS, AS I
16 SAY, NINE LINES OUT OF 11 MILLION. IT IS VERY SIMPLE CODE. AND
17 CANDIDLY, I'M NOT SURE THERE'S ANY OTHER WAY TO DO THAT CODE
18 IT'S WHEN YOUR SORTING A RANGE OF THINGS.

19 AND IT BASICALLY CHECKS TO SEE, OKAY, DO WE HAVE THE
20 RIGHT NUMBER OF THINGS IN THE ARRAY? ARE THEY IN THE RIGHT
21 ORDER?

22 IT IS VERY, VERY FUNCTIONAL NINE LINES OF CODE.
23 THAT'S WHAT IS NOW LEFT OF ANY ALLEGATION OF LITERAL CODE
24 COPYING. AND WHAT MR. JACOBS REFERRED TO, AND I THINK YOUR
25 HONOR IS FAMILIAR WITH IN THE PAPERS, THE SAME MAN WROTE THAT

1 CODE.

2 IT'S VERY SIMPLE, VERY BASIC CODE. SO THAT IS STILL
3 IN ANDROID. IT ABSOLUTELY IS. THE A FILES ARE OUT. THE
4 COMMENTS FROM THE TWO OTHER FILES ARE OUT, BUT THOSE NINE LINES
5 ARE STILL IN ANDROID.

6 AND IF THAT'S WHAT THE COPYRIGHT CLAIM COMES DOWN TO
7 AND WE'RE ARGUING ABOUT THOSE NINE LINES, ON THAT LINE, YOUR
8 HONOR, WE DO HAVE AN ISSUE FOR SURE, BECAUSE THOSE NINE LINES,
9 EVEN IN THE CONTEXT OF JUST THE FILE IT'S IN, IT'S NINE LINES
10 OUT OF SEVERAL HUNDRED. SO --

11 **THE COURT:** WHAT DO YOU SAY TO THE DERIVATIVE COPYING
12 POINT THAT, OKAY, SO IF YOU DON'T HAVE IDENTICAL LANG., YOU'VE
13 GOT -- IT IS DERIVED FROM THEIR WORKS.

14 **MR. BABER:** WELL, AND I WANTED TO GO BACK TO THE SAME
15 SLIDE MR. JACOBS JUST USED WITH YOU BECAUSE IT PROVES THE POINT,
16 IN MY VIEW.

17 FIRST OF ALL, HE DIDN'T SHOW YOU APPLES TO APPLES.
18 HE SHOWED YOU THEIR SPECIFICATION FOR THE API ON THE LEFT AND
19 SOME OF OUR SOURCE CODE ON THE RIGHT.

20 **THE COURT:** PUT IT ON THE SCREEN.

21 **MR. VAN NEST:** SLIDE 18.

22 **MR. BABER:** OKAY. SO YOU DON'T HAVE AN APPLES TO
23 APPLES COMPARISON.

24 **THE COURT:** ALL RIGHT.

25 **MR. BABER:** BUT WHAT THIS SHOWS --

1 **THE COURT:** EXPLAIN THAT. START OVER BECAUSE --

2 **MR. BABER:** SURE. IF YOU LOOK UP HERE AT THE LEFT
3 WHAT THEY ARE GIVING YOU FOR THEIR SIDE IS NOT SOURCE CODE. IT'S
4 THE SPECIFICATION. IT IS SOMETHING THAT GENERATES BASICALLY A
5 TEXT DOCUMENT THAT SAYS ENGLISH WORDS WHAT THIS CONSTRUCTOR
6 DOES. IT CREATES A NEW PROTECTION DOMAIN WITH THE GIVEN CODE
7 SOURCE AND PERMISSION.

8 SO YOU HAVE TO PROVIDE TO IT CERTAIN INFORMATION.

9 FIRST OF ALL, IT'S CALLED -- IT'S CALLED "PROTECTION
10 DOMAIN." THAT'S THE NAME, THE GREEN BOX. GREEN BOX
11 (INDICATING).

12 **THE COURT:** NAME OF WHAT?

13 **MR. BABER:** THAT'S THE NAME OF THIS API.

14 **THE COURT:** IT'S CALLED?

15 **MR. BABER:** "PROTECTION DOMAIN."

16 **THE COURT:** PROTECTION DOMAIN. ALL RIGHT. SO WHAT
17 IS THE NAME OF THE ONE ON THE ANDROID SIDE?

18 **MR. BABER:** SAME NAME, BECAUSE WE'RE IMPLEMENTING THE
19 SAME API. THE ANDROID CODE TELLS YOU IT'S A PUBLIC API WHICH
20 MEANS A DEVELOPER CAN GO LOOK IT UP. THEY CAN KNOW IT'S THERE.
21 IT'S PUBLIC TO HIM. IT HAS THE SAME NAME: "PROTECTION DOMAIN."

22 THIS IS ONE OF THOSE SHORT WORDS AND PHRASES. THEY
23 ARE NOT COPYRIGHTABLE. AND, YES, IT APPEARS IN THE ANDROID
24 SOURCE CODE.

25 THE OTHER BOXES THAT ARE HIGHLIGHTED IN RED, YELLOW,

1 PURPLE AND BLUE ARE WHAT I REFERRED TO EARLIER AS THOSE ARE THE
2 SHORT WORDS AND PHRASES, THE NAMES, THE PARAMETERS, WHAT ARE
3 CALLED THE "ARGUMENTS"; IN OTHER WORDS, IT TELLS WHAT DO YOU
4 HAVE TO PROVIDE TO THE CODE FOR IT TO PERFORM THE FUNCTION? AND
5 WHAT WILL IT GIVE BACK TO YOU AS A RESULT?

6 SO HE SHOWED YOU THEIR ENGLISH WORD, DESCRIPTION OF
7 IT OVER HERE, AND OUR SOURCE CODE. IF YOU PUT THE SOURCE CODE
8 SIDE-BY-SIDE YOU WOULD SEE THE ONLY ELEMENTS THAT ARE THE SAME
9 ARE THOSE REQUIRED ELEMENTS TO IMPLEMENT THE API THAT HAS BEEN
10 DEFINED AS THE PROTECTION DOMAIN API.

11 NOTHING ELSE.

12 **THE COURT:** JUST A SECOND. JUST A SECOND.

13 I'M SORRY. THE PART -- THERE ARE REALLY FOUR PARTS
14 TO THAT DIAGRAM. ON THE LEFT SIDE IS THE JAVA, CORRECT?

15 **MR. BABER:** ON THE LEFT SIDE IS THE JAVA
16 SPECIFICATION.

17 **THE COURT:** AND ON THE RIGHT SIDE?

18 **MR. BABER:** THE ANDROID SOURCE CODE THAT IMPLEMENTS
19 THAT SPECIFICATION.

20 **THE COURT:** SO MR. JACOB'S ARGUMENT IS: OKAY.
21 THAT'S THE PLOT LINE OVER THERE ON THE LEFT. AND THAT YOUR SIDE
22 TOOK THAT PLOT LINE AND USED THAT PLOT LINE TO WRITE THE MOVIE
23 ABOUT THE RAILROADS.

24 THAT'S HIS ARGUMENT. AND SO WHAT'S WRONG WITH THAT
25 ARGUMENT? COULD A JURY REASONABLY FIND THAT THAT'S EXACTLY WHAT

1 YOU DID DO?

2 **MR. BABER:** NOT UNDER NINTH CIRCUIT LAW, YOUR HONOR
3 BECAUSE UNDER NINTH CIRCUIT LAW YOUR HONOR WOULD HAVE TO
4 INSTRUCT THE JURY THAT, FIRST OF ALL, NAMES, ALL WE'RE LOOKING
5 AT HERE IS NAMES AND SHORT PHRASES. THEY ARE NEVER PROTECTABLE
6 UNDER COPYRIGHT, PERIOD. FULL STOP. SO --

7 **THE COURT:** WELL, THAT'S WHAT YOU SAY. BUT MAYBE
8 THAT'S NOT RIGHT. BUT LET'S ASSUME THAT'S EVEN RIGHT. THAT THE
9 SOURCE CODE ITSELF, ISN'T THAT DERIVED -- ISN'T THAT DERIVED
10 FROM THE PLOT LINE?

11 **MR. BABER:** IT IS NOT, YOUR HONOR, BECAUSE THE ONLY
12 ELEMENTS THAT ARE THE SAME ARE THE ELEMENTS THAT ARE REQUIRED TO
13 BE COMPATIBLE. IN OTHER WORDS, THERE'S NOTHING OVER HERE IN THE
14 SOURCE CODE. ALL OF THIS, THIS IS THE SOURCE CODE.

15 THERE'S NOTHING IN THE SOURCE CODE THAT COMES FROM
16 THEM OTHER THAN THE ELEMENTS THAT YOU HAVE TO HAVE IN ORDER FOR
17 CODE THAT USES THIS API, WHETHER IT'S EXISTING CODE OR NEWLY
18 WRITTEN CODE. THE ONLY THING THAT'S OVER THERE IN OUR SOURCE
19 CODE THAT COMES FROM THEM ARE THE ESSENTIAL ELEMENTS NECESSARY
20 FOR COMPATIBILITY TO UTILIZE THAT API.

21 **THE COURT:** WELL, MAYBE A BETTER EXAMPLE FOR YOU JUST
22 TO MAKE YOUR ARGUMENT FOR A MOMENT, HELP ME UNDERSTAND IT.
23 LET'S GO BACK TO THE SQUARE ROOT ONE. SO IF WE HAD THE SQUARE
24 ROOT ONE OVER THERE, INSTEAD OF SAYING "CREATES A NEW PROTECTION
25 DOMAIN," ET CETERA, WHAT THAT WOULD SAY IS: "FIND SQUARE ROOT

1 OF ANY GIVEN RANGE OR RETURN SQUARE ROOT FOR ANY" --

2 **MR. BABER:** I THINK YOU ARE LEARNING JAVA, YOUR
3 HONOR. PROBABLY WOULD SAY "RETURN," BUT AS JAVA SAYS "SQUARE
4 ROOT OF INTEGER."

5 **THE COURT:** ALL RIGHT. SO THAT'S WHAT IT WOULD SAY
6 ON THE LEFT. AND THEN, ON THE RIGHT IT'S NOT SO CLEAR HOW YOU
7 WOULD ACTUALLY IMPLEMENT THAT. IT'S KIND OF LIKE ON THE ONE
8 HAND SAYING:

9 "GO TO THE MOON WITHIN THREE YEARS, STARTING IN
10 1962."

11 THAT IS A TALL ORDER, AND IT MAY NOT BE SO CLEAR HOW
12 TO ACTUALLY WRITE IT OUT. SO OVER THERE I WOULDN'T HAVE A CLUE
13 AS TO HOW TO WRITE THE SOURCE CODE TO FIND THE SQUARE ROOT OF A
14 NUMBER.

15 YOU KNOW, WE COULD WORK ON THAT AWHILE. BUT JUST TO
16 SAY WHAT YOUR OBJECTIVE IS, RETURN SQUARE ROOT FOR ANY GIVEN
17 ARGUMENT, THAT DOESN'T TELL YOU WHAT THE SOURCE CODE WOULD BE IN
18 ORDER TO MAKE THAT HAPPEN.

19 **MR. BABER:** THAT'S EXACTLY RIGHT, YOUR HONOR.

20 **THE COURT:** ALL RIGHT. SO THAT'S YOUR ARGUMENT.

21 **MR. BABER:** WELL, IT'S MORE THAN THAT, YOUR HONOR.

22 **THE COURT:** SO IT'S A FUNCTION AND NOT A -- IT'S NOT
23 REALLY A -- IN OTHER WORDS, YOUR POINT IS THAT'S NOT EVEN THE
24 PLOT LINE. THAT DOESN'T TELL YOU HOW TO WRITE THE CODE. THAT'S
25 LIKE SAYING "TIME TRAVEL. WE WANT TO HAVE TIME TRAVEL."

1 WELL, HOW ARE YOU GOING TO DO IT? IT'S NOT
2 IMPLEMENTED. IT'S NOT ENABLED TO USE A PATENT PHRASE. ALL
3 RIGHT.

4 **MR. BABER:** THAT'S EXACTLY RIGHT.

5 **THE COURT:** SO THAT'S YOUR ARGUMENT.

6 **MR. BABER:** THE API SPECIFICATIONS BASICALLY SAY
7 WE'RE GOING TO HAVE A SHORTCUT. WE'RE GOING TO CALL IT X. AND
8 YOU HAVE TO GIVE IT A CERTAIN THING. AND IF YOU GIVE IT A
9 CERTAIN THING IT WILL SEND YOU BACK SOMETHING ELSE.

10 NOW, YOU GO FIGURE OUT HOW YOUR CODE IS GOING TO DO
11 THIS. SQUARE ROOT IS A GOOD EXAMPLE. THERE ARE MANY DIFFERENT
12 COMPUTER ALGORITHMS THAT CAN ACTUALLY CALCULATE A SQUARE ROOT.

13 THEY CAN BE DONE DIFFERENT WAYS, AND THE SOURCE CODE
14 WILL LOOK DIFFERENT. THAT'S WHAT WE HAVE HERE.

15 **THE COURT:** ONE WAY WOULD BE TO USE LOGARITHMS. ONE
16 WAY I COULD IMAGINE THAT'S THE WAY, WORK BACKWARDS USING THE WAY
17 A SLIDE RULE WOULD WORK. SO YOU GOT THE NUMBER FOUR. YOU TAKE
18 THE LOGARITHM OF FOUR, AND THEN YOU WOULD TAKE HALF OF THAT.

19 **MR. BABER:** I DO REMEMBER SLIDE RULES, YOUR HONOR,
20 BUT THAT'S ABOUT THE EXTENT OF --

21 **THE COURT:** THAT WOULD BE ONE WAY. THAT WOULD BE ONE
22 WAY TO DO IT. BUT THAT'S NOT A -- THAT PLOT LINE -- THAT PLOT IS
23 NOT CALLED OUT BY THAT PLOT LINE, IF THAT'S WHAT IT IS.

24 ALL RIGHT. I DON'T KNOW THE ANSWER TO ALL OF THIS.
25 BUT YOU WILL GET AN ORDER PROBABLY LATER TODAY THAT EXPLAINS

1 WHAT THE ANSWER TO IT IS.

2 **MR. BABER:** IS MY TIME UP, YOUR HONOR?

3 **THE COURT:** SO I WANT TO SAY YOU ALL DID A GREAT JOB,
4 INCLUDING MR. SWOOPES. YOU DID A GREAT JOB, TOO. I'M GLAD YOU
5 GOT A CHANCE TO ARGUE. WE HAVE ANOTHER MATTER THAT COMES UP IN
6 A FEW MOMENTS.

7 WE'RE GOING TO TAKE A SHORT RECESS, AND THEN RESUME
8 WITH THE ARGUMENTS. OKAY.

9 **MR. VAN NEST:** EXCUSE ME, YOUR HONOR. CAN WE HAVE
10 JUST A MOMENT ON ONE CASE MANAGEMENT ISSUE?

11 **THE COURT:** ALL RIGHT. WHAT'S THAT?

12 **MR. VAN NEST:** THE ISSUE IS THIS: WE JUST RECEIVED
13 THEIR SECOND TRY DAMAGES REPORT. YOUR HONOR HAD TOLD THEM THAT
14 REPORT NEEDS TO BE KEYED OFF THE CLAIMS THAT YOU THINK YOU COULD
15 ACTUALLY TRY IN WHAT IS NOW A TWO-WEEK TRIAL.

16 THAT REPORT CAME IN MONDAY NIGHT.

17 **THE COURT:** NO, IT'S GOING TO WIND UP BEING THREE
18 WEEKS. BUT I'M TELLING YOU THAT YOU ARE OVERREACHING YOUR
19 COMPANY AND ORACLE, BECAUSE YOU ONLY GIVE YOUR EMPLOYEES TWO
20 WEEKS WITH PAY. BUT WHEN YOU BIG USERS OF THE FEDERAL COURTS
21 WANT TO COME IN AND IMPOSE ON A JURY FOR MONTHS ON END, IT'S
22 FINE AS FAR AS YOU'RE CONCERNED. BUT WHEN IT'S YOUR OWN
23 EMPLOYEES YOU SAY TWO WEEKS.

24 **MR. VAN NEST:** WE'RE NOT ASKING FOR THREE WEEKS, YOUR
25 HONOR.

1 **THE COURT:** WELL, THE OTHER SIDE HAS ASKED.

2 **MR. VAN NEST:** THAT'S RIGHT. MY POINT IS SIMPLY A
3 CASE MANAGEMENT POINT. WHAT YOUR HONOR TOLD THEM IS KEY YOUR
4 DAMAGE REPORT OFF THE CLAIMS YOU ACTUALLY THINK YOU CAN TRY.
5 THEY STILL HAVE --

6 **THE COURT:** I PROBABLY SAID THAT. I DON'T REMEMBER
7 SAYING THAT, BUT OKAY.

8 **MR. VAN NEST:** IT'S IN THE ORDER. IT'S IN THE ORDER.

9 **THE COURT:** ALL RIGHT. WHAT'S YOUR POINT?

10 **MR. VAN NEST:** SO MY POINT IS THE REDONE, THE SECOND
11 TRY DAMAGE REPORT STILL HAS ALL SEVEN PATENTS, 41 CLAIMS. AND
12 NOW WE'RE IN A SITUATION WHERE WE'RE SEVERAL WEEKS AWAY FROM
13 TRIAL IN A CASE I THINK ALL OF US ACKNOWLEDGE IS UNTRIABLE IN
14 THAT KIND OF PERIOD. AND IT SEEMS TO ME THAT --

15 **THE COURT:** I'M NOT ACKNOWLEDGING THAT. I'M SAYING
16 THAT'S THE TIME YOU ARE GOING TO GET; THAT I BELIEVE YOU CAN
17 GET. AND BOTH -- MR. JACOBS TOLD ME HE COULD TRY THIS CASE IN
18 THAT PERIOD OF TIME EARLIER. AND I'M HOLDING HIM TO THAT.

19 **MR. VAN NEST:** OKAY. SO I GUESS --

20 **THE COURT:** WHAT IS YOUR POINT? YOU WANT TO BRING A
21 MOTION?

22 **MR. VAN NEST:** WELL, MY POINT IS: IS YOUR HONOR'S
23 INTENTION TO TRY --

24 **THE COURT:** TAKE IT UP AT THE PRETRIAL CONFERENCE.

25 **MR. VAN NEST:** -- TO TRY THE TWO WEEKS ON LIABILITY

1 IN OCTOBER.

2 **THE COURT:** NO. IT'S ALL DAMAGES, EVERYTHING.

3 **MR. VAN NEST:** OKAY. BECAUSE WE HAD UNDERSTOOD FROM
4 YOUR LAST COMMENTS THAT BECAUSE OF MR. KERN'S PARTICIPATION,
5 PROFESSOR KERNS --

6 **THE COURT:** OH, YES. I'M GIVING THAT SOME THOUGHT.
7 THAT WHAT WE WILL DO -- I HAVEN'T MADE A FINAL DECISION. I WANT
8 TO HEAR YOUR VIEWS AT THE FINAL PRETRIAL CONFERENCE. BUT I WANT
9 TO GIVE HIM A CHANCE TO DO HIS OWN DAMAGE ANALYSIS. AND SO
10 PROBABLY WHAT WE ARE GOING TO DO IS HAVE A SHORTER LIABILITY
11 TRIAL AND TELL THE JURY:

12 "YOU DON'T HAVE TO COME BACK IF YOU FIND NO
13 DAMAGES -- I MEAN NO LIABILITY. BUT IF YOU DO FIND
14 LIABILITY, THEN WE'RE GOING TO COME BACK LATER AND
15 HAVE MR. KERNS TESTIFY ALONG WITH THE DAMAGES
16 EXPERTS."

17 THAT'S THE ONLY PRACTICAL WAY I CAN SEE TO DO THIS SO
18 YOU NEED TO GET CRACKING AND GET YOUR OWN REPORT DONE.

19 **MR. VAN NEST:** RIGHT. WE'RE DOING THAT.

20 **THE COURT:** I DON'T UNDERSTAND WHAT YOU'RE ASKING ME
21 TO DO.

22 **MR. VAN NEST:** I GUESS MY QUESTION IS: IS THERE ANY
23 UPDATE ON THE SCHEDULE? BECAUSE RIGHT NOW I'M LOOKING AT A
24 SITUATION WHERE THEY ARE EXPECTING US TO TRY SEVEN PATENTS AND
25 41 CLAIMS IN WHAT I THINK I UNDERSTAND TO BE ROUGHLY A TWO-WEEK

1 PERIOD. AND TO ME THAT IS A CASE MANAGEMENT DISASTER ABOUT TO
2 HAPPEN. AND IF THERE'S A WAY OF GIVING THE PARTIES A DEADLINE
3 ON HOW MANY CLAIMS YOU'RE ACTUALLY GOING TO PUT IN THIS TRIAL --

4 **THE COURT:** I THOUGHT THEY HAD AGREED TO GIVE YOU A
5 FINAL LIST BY SOME DATE. WHAT WAS THAT DATE?

6 **MR. VAN NEST:** WELL, THAT DATE WENT BY THE BOARDS
7 WHEN YOUR HONOR SAID: "KEY YOUR SECOND TRY DAMAGE REPORT TO THE
8 CLAIMS YOU ARE GOING TO TRY."

9 SO I THINK THAT DATE WAS MONDAY, AND WE'VE GOT IT.
10 AND IT'S SEVEN PATENTS AND 41 CLAIMS.

11 **THE COURT:** BUT THERE WAS AN EARLIER STIPULATION THAT
12 YOU HAD THAT THE PLAINTIFF WAS GOING TO WINNOW DOWN THE NUMBER
13 OF CLAIMS TO -- I THINK IT WAS 22, WHICH IN MY OWN OPINION IS
14 WAY TOO MANY. BUT I HAVEN'T RULED THAT OUT. SO DID THEY DO
15 THAT?

16 **MR. VAN NEST:** NO. I MEAN, THEY ARE STILL AT 41.
17 THEY ARE STILL AT 41 NOW.

18 **THE COURT:** THEN, THAT VIOLATES WHAT THEY SAID THEY
19 WERE GOING TO DO.

20 MR. JACOBS, CAN YOU EXPLAIN TO ME, IS THAT TRUE?

21 **MR. JACOBS:** THIS IS THE FIRST TIME HEARING OF THIS
22 ISSUE.

23 **THE COURT:** HAVE YOU GOTTEN IT DOWN TO THE 22 YET?

24 **MR. JACOBS:** NO, WE HAVEN'T. AND WE'RE NOT DUE FOR
25 THAT YET, YOUR HONOR. BUT I CAN INFORM YOU THAT --

1 **THE COURT:** WHEN ARE YOU DUE FOR THAT?

2 **MR. JACOBS:** WE'RE DUE -- I WOULD LIKE TO GO BACK AND
3 CHECK.

4 **THE COURT:** WHATEVER IT WAS, I NEVER RELIEVED YOU
5 FROM THAT OBLIGATION.

6 **MR. JACOBS:** THAT'S CORRECT.

7 **THE COURT:** ALL RIGHT. SO --

8 **MR. JACOBS:** BUT YOU CAN REASSURE YOUR HONOR WE HAVE
9 A PLAN. THE PLAN ESSENTIALLY, AND THE REASON THIS IS A --

10 **THE COURT:** THAT'S WHAT PRESIDENT NIXON SAID. THAT'S
11 WHAT PRESIDENT NIXON SAID.

12 **MR. JACOBS:** THE REASON THAT THIS IS A TEMPEST IN A
13 TEAPOT IS THAT WHAT WE WILL BE DOING IS REDUCING THE SET OF
14 CLAIMS SO THAT THE TECHNICAL CONTENT WE'RE IMPARTING AND WE'RE
15 LITIGATING, EVEN IF IT'S IN DIFFERENT FORMS, SO IF IT'S A
16 DIFFERENT -- WHETHER THE CLAIM IS INDIRECT INFRINGEMENT OR
17 DIRECT INFRINGEMENT, WE WILL NOT BE OVERLOADING THE PROCESS WITH
18 A WHOLE BUNCH OF DIVERSE CLAIMS FROM THE STANDPOINT OF TECHNICAL
19 CONTENT.

20 WE HAVE SOME WORK TO DO TO GET THAT CLAIM DOWN, BUT
21 THE DAMAGES STUDY DOES NOT TURN ON THE ADJUSTMENTS WE NEED TO
22 MAKE IN ORDER TO COMPLY WITH THE PREVIOUS ORDER.

23 **MR. VAN NEST:** WHEN?

24 **THE COURT:** WELL, I HAVE FORGOTTEN WHAT THE DATE WAS,
25 BUT THERE WAS A DATE BY WHICH YOU AGREED THAT YOU WOULD TELL THE

1 OTHER SIDE WHAT THE 22 CLAIMS WOULD BE. AND WHATEVER THAT DATE
2 IS YOU SHOULD HONOR THAT.

3 AND NOW, THERE IS A SEPARATE QUESTION OF WHETHER OR
4 NOT THE DAMAGES STUDY IS A PROPER DAMAGES STUDY, AND I'M NOT
5 GOING TO -- I CAN'T POSSIBLY GIVE YOU AN ANSWER ON THAT NOW.
6 AND IF YOU WANT TO BRING A MOTION TO KNOCK THAT ONE OUT, THAT
7 SHOULD BE ONE OF YOUR MOTIONS IN LIMINE.

8 **MR. VAN NEST:** I GUESS MY QUESTION, YOUR HONOR, IS
9 I'M HEARING NOW THAT HE HAS UNDERTAKEN, BELIEVES HE HAS AN
10 OBLIGATION TO CUT THE CLAIMS DOWN FURTHER, WHICH IS GREAT. BUT
11 EXPERT REPORTS ARE IN. EXPERT DISCOVERY IS ONGOING. WE'RE
12 WORKING UP THE DAMAGES REPORTS NOW. WHEN IS THAT GOING TO BE?
13 WHEN IS THAT GOING TO HAPPEN? I DON'T THINK --

14 **THE COURT:** WELL, GO LOOK AT WHATEVER THAT DATE WAS
15 BY WHICH MR. JACOBS SAID HE WOULD DO IT, WHICH I DON'T HAVE IN
16 MIND ANYMORE. ONE OF YOU MUST BE ABLE TO FIND THAT WITH YOUR
17 EXCELLENT TEAMS.

18 **MR. BABER:** YOUR HONOR, IF I MAY, AS I RECALL WHAT
19 HAPPENED BACK IN THE SUMMER WHEN THE PARTIES WORKED ON A CASE
20 MANAGEMENT PLAN WITH YOU, THE PARTIES SENT IN COMPETING
21 PROPOSALS WHERE WE SUGGESTED THEY CUT DOWN TO A SMALLER NUMBER
22 OF CLAIMS BY A CERTAIN DATE. THEY DIDN'T AGREE TO THAT. AND BY
23 THE END OF THE PROCESS YOUR HONOR SAID:

24 "LOOK, WHAT YOU'VE AGREED DO, I'LL IMPOSE. THE
25 REST OF IT YOU JUST COME BACK AND I'LL FIGURE OUT

1 WHEN YOU COME IN IS THIS CASE TRIABLE? IF YOU HAVE
2 TOO MANY CLAIMS IT'S NOT GOING TO BE TRIABLE."
3 AND THAT'S HOW I THINK YOU LEFT IT. I'M NOT SURE
4 THERE IS A DEADLINE.

5 **THE COURT:** MY MEMORY IS MR. JACOBS SAID SOMETHING
6 LIKE HE'S GOING TO GET IT DOWN TO 22. I'M NOT AGREEING THAT
7 THAT WOULD BE A TRIABLE NUMBER. BUT I'M HOLDING HIM TO AT LEAST
8 THAT MUCH. AND WHATEVER THE DATE WAS BY WHICH HE SAID HE WOULD
9 DO THAT HE SHOULD DO IT.

10 **MR. JACOBS:** YOUR HONOR, I JUST AM -- I PREPARED FOR
11 THE COPYRIGHT HEARING TODAY, NOT FOR THIS SIDESHOW. SO I WOULD
12 LIKE TO GO TO THE RECORD. AND BY NOT OBJECTING TO ANY
13 CHARACTERIZATION OF THIS, I DON'T WANT TO BE CONSTRUED AS HAVING
14 ASSENTED TO WHAT THEY HAVE SAID ABOUT IT.

15 **THE COURT:** YOU HAVEN'T ASSENTED TO ANYTHING, AND I'M
16 NOT RULING ON ANYTHING ON THIS POINT. IT'S NO ONE KNOWS THE
17 ANSWER. I MEAN, YOU BRING UP A CASE MANAGEMENT POINT, MR. VAN
18 NEST, BUT YOU DON'T KNOW THE ANSWER TO WHAT WAS THE DUE DATE FOR
19 THE 22.

20 **MR. VAN NEST:** MY POINT IS I DON'T THINK THERE IS A
21 DUE DATE CURRENTLY. I THINK THE CHAIN OF EVENTS THAT'S OCCURRED
22 HAS LEFT THAT --

23 **THE COURT:** IF IT TURNS OUT THAT I GET TO THE FINAL
24 PRETRIAL CONFERENCE AND THIS CASE IS NOT ONE THAT I THINK COULD
25 BE TRIED IN ANY COHERENT WAY WE'RE JUST GOING TO STAY THE ENTIRE

1 CASE AND LET THE PTO FIX IT. I PROMISE YOU THAT'S GOING TO BE
2 THE RESULT IF YOU PRESENT ME WITH A MESS.

3 SO IT WOULD BE THE PLAINTIFF IS UNDER A LOT OF
4 PRACTICAL PRESSURE TO MAKE THIS BE A TRIABLE CASE AND NOT THROW
5 A BUNCH OF SCRAMBLED EGGS IN FRONT OF THE GOOD CITIZENS OF THIS
6 DISTRICT. THAT WILL NOT DO.

7 PLUS, I'VE GOT A TON OF OTHER CASES THAT WANT TO GO
8 TO TRIAL BECAUSE I'VE BEEN IN IN GIGANTIC CRIMINAL CASE. AND I
9 HAVE A LOT OF BACKED UP CASES THAT WANT TO GO TO TRIAL THAT CAN
10 BE DONE IN ONE WEEK, ONE-AND-A-HALF WEEKS, TWO WEEKS, MAYBE. IN
11 FACT, I GOT ANOTHER PATENT CASE AHEAD OF YOU THAT I AM -- SO
12 THERE ARE -- YOU HAVE TO GET YOUR CASE TO A MANAGEABLE,
13 PRESENTABLE -- WHEN THAT OCCURS I'M GOING TO GIVE YOU AS MUCH
14 TIME AS I CAN AFFORD TO GIVE YOU.

15 YOU SAID EARLIER THREE WEEKS TOTAL, GRAND TOTAL THREE
16 WEEKS FOR THE WHOLE CASE. ALL RIGHT. THAT'S THE BEST I CAN DO.

17 **MR. JACOBS:** THANK YOU, YOUR HONOR.

18 **MR. VAN NEST:** THANK YOU, YOUR HONOR.

19 **MR. BABER:** THANK YOU.

20 **THE COURT:** WITH THE CITY AND COUNTY CASE WE'RE GOING
21 TO TAKE A SHORT BREAK FOR THE COURT REPORTER AND RESUME IN TEN
22 MINUTES.

23 (THEREUPON, THIS HEARING WAS CONCLUDED.)

24

25

CERTIFICATE OF REPORTER

I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 18TH DAY OF SEPTEMBER, 2011.

/S/ KATHERINE WYATT